TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 94

MOTHER LODE COALITION MINES COMPANY,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1942.

CERTIORARI GRANTED JUNE 8, 1942.

SUPREME COURT OF THE UNITED STATES

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INDEX.

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Docket Entries.

DOCKET No. 98500 1

MOTHER LODE COALITION MINES COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES:

For Taxpayer: PAUL E. SHORB.

For Comm'r: CONWAY KITCHEN.

1939 2

May 12—Petition received and filed. Taxpayer notified. (Fee paid.)
May 12—Copy of petition served on General Counsel.
May 15—Request for circuit hearing in New York City filed by taxpayer. 5/15/39 copy served.
June 8—Answer filed by General Counsel.
June 15—Copy of answer served on taxpayer. New York City Calendar.

1940

Mar. 13—Hearing set April 29, 1940, New York City. 3
Apr. 30—Hearing had before Mr. Murdock on the merits. Submitted. Briefs due 6/14/40; Reply Brief due 6/29/40.
May 10—Transcript of hearing 4/30/40 filed.
June 14—Brief filed by taxpayer.
June 14—Brief filed by General Counsel.
June 15—Copy of brief served on General Counsel.
June 29—Memorandum reply to respondent's brief filed by taxpayer.
Aug. 20—Findings of fact and opinion rendered, Murdock, Div. 3. Decision will be entered for the respondent.

Aug. 26—Decision entered, J. E. Murdock, Div. 3.

Sept. 19—Motion to vacate decision and modify the findings of fact and opinion of Board or for further hearing to supplement and enlarge the record filed by taxpayer. 9/21/40 Denied.

Sept. 19—Motion for review by the Full Board of the decision and report of the division, filed by taxpayer.

Sept. 24—Order denying Review by the Board, entered.

Sept. 26—Supersedeas bond in the amount of $6,951.14 approved and ordered filed.

5 Sept. 26—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Sept. 26—Proof of service filed by taxpayer.

1941

Jan. 21—Motion for extension to April 1, 1941 to complete and transmit the record filed by taxpayer.

Jan. 21—Order enlarging time to April 1, 1941 to complete and transmit the record, entered.

Mar. 28—Motion for extension of time to May 1, 1941, to

6 complete and transmit the record filed by taxpayer.

Mar. 28—Order enlarging time to May 1, 1941 to complete and transmit the record, entered.

Apr. 28—Motion for extension of time to June 1, 1941 to prepare and transmit the record filed by taxpayer.

Apr. 28—Order enlarging time to June 2, 1941, to prepare and transmit the record, entered.

May 29—Motion for extension of time to July 1, 1941 to prepare and transmit the record filed by taxpayer.

May 29—Order enlarging time to July 1, 1941 to prepare and transmit the record, entered.

June 27—Motion for extension of time to July 21, 1941, to prepare and transmit the record, filed by taxpayer. 7

June 27—Order enlarging time to July 21, 1941 to prepare and transmit the record, entered.

July 11—Agreed statement of evidence lodged.

July 11—Agreed praecipe for record filed—with proof of service thereon.

July 12—Agreed statement of evidence approved and ordered filed.

Petition. 8

(Filed May 12, 1939.)

UNITED STATES BOARD OF TAX APPEALS

Docket No. 98500

[SAME TITLE]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (SN-IT-1/LAL-90D) dated February 18, 1939, and as a basis of its proceeding alleges as follows: 9

1. The petitioner is a corporation created under the laws of the State of Delaware with its principal office at 120 Broadway, New York, N. Y. The return for the period here involved was filed with the Collector of Internal Revenue for the Second District of New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 18, 1939.

10 *Petition.*

3. The taxes in controversy are income taxes for the calendar year 1935 and in the amount of $3,475.57.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent, in determining petitioner's taxable net income for the year 1935, erred in disallowing as a deduction percentage depletion in the sum of $25,276.88.

(b) The respondent erred in determining that petitioner had failed to elect that the depletion allowance for the year
11 1935 in respect of its mining property shall be computed with regard to percentage depletion.

(c) The respondent erred in determining that petitioner was entitled to no depletion allowance for the year 1935 in respect of its mining property.

5. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) Petitioner during the years 1933, 1934 and 1935 owned, and still owns, certain mining property located at or near Kennecott, Alaska. During the years 1933, 1934 and 1935 petitioner conducted its business with net profits
12 resulting in 1933 and 1935 and a loss in the year 1934.

(b) Pursuant to the provisions of Section 114(b)(4), Revenue Act of 1932, petitioner elected in its 1933 Federal income tax return to have the depletion allowance for its mining property for the year 1933 and all subsequent taxable years, computed with reference to percentage depletion. In its 1934 Federal income tax return, petitioner reported no net income but, on the contrary, a loss even without any depletion deduction of any kind. No statement was made in said return with respect to depletion. No depletion was allowable petitioner for the year 1934 on a cost basis or on a percentage depletion basis.

(c) Petitioner's Federal income tax return for the year 1935 reported a profit and net income and stated (1) that it had elected percentage depletion for 1933 and thereafter, and (2) that it was deducting percentage depletion for 1935 and all future years. The depletion allowance for the year 1935 to which petitioner is entitled on the percentage basis, amounts to $25,276.88. No depletion would be allowable to petitioner for the year 1935 on a cost basis.

(d) Petitioner avers that it elected, as required by law, to have its depletion allowance for its mining property for the year 1935 computed with reference to percentage depletion and that accordingly it is entitled to percentage depletion deduction for the year 1935 in the sum of $25,276.88.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine:

(a) That petitioner, pursuant to the applicable statute, elected to have its depletion allowance for its mining property for the calendar year 1935 computed with reference to percentage depletion;

(b) That in determining petitioner's taxable net income for the calendar year 1935, it is entitled to a deduction of $25,276.88 on account of percentage depletion for said year;

(c) That there is no deficiency in tax due or owing from petitioner for the calendar year 1935;

(d) Such other and further relief as the nature of the case may require.

(Signed) PAUL E. SHORB,
701 Union Trust Building,
Washington, D. C.
Counsel for Petitioner.

State of New York,
County of New York, ss.:

R. C. KLUGESCHEID, being duly sworn, says that he is the Secretary of MOTHER LODE COALITION MINES COMPANY, the petitioner above named, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and those he believes to be true.

17 Original signed by

R. C. KLUGESCHEID.

Subscribed and sworn to before me this 10th day of May, 1939.

E. W. SCHWARZ,
Notary Public.

EXHIBIT "A."

SN-IT-1

Treasury Department
18 Internal Revenue Service

February 18, 1939

Second New York Division

Mother Lode Coalition Mines Company,
120 Broadway,
New York, New York.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1935 discloses a deficiency of $3,475.57 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Revenue Agent in Charge, 90 Church St., New York, N. Y. for the attention of LAL-90D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By

_____ (sgd.) C. R. KRIGBAUM,
Internal Revenue Agent in Charge.

Enclosures:

Statement.
Form of Waiver.

STATEMENT.

Mother Lode Coalition Mines Company,
120 Broadway,
New York, New York.

Tax Liability for Taxable Year Ended December 31, 1935.

	Liability	Assessed	Deficiency
Income tax	$12,902.78	$9,427.21	$3,475.57

In making this determination of your income tax liability, careful consideration has been given to the reports
23 of examination dated December 31, 1936 and January 11, 1939, and to your protest dated January 27, 1939.

Adjustment to Net Income

Net income reported in revenue agent's report dated December 31, 1936, to which you have agreed	$68,561.55
Unallowable deductions and additional income:	
(a) Percentage depletion	25,276.88
24 Net income adjusted	$93,838.43

Explanation of Adjustment

(a) This office holds that under section 114(b)(4) of the Revenue Act of 1934 a new election of the basis for computing depletion is required and that the failure on your part to make an affirmative election in 1934 is in the terms of the Statute an election to compute depletion without reference to percentage depletion. The method of computing depletion, having become fixed at the time of filing the 1934 return, may not thereafter be changed in 1935. Since the allowable cost basis of depletable assets, plus the cap-

italized development costs, was fully recovered through a cost basis depletion by 1925, it follows that no further depletion is allowable.

Computation of Tax
1935

Net income as adjusted.....		$93,838.43
Income tax at 13 3/4 percent.....		$12,902.78
Total income tax.....		$12,902.78
Income tax assessed:		
Original, Account No. 406072.....	$8,726.58	
Additional, Feb., 1937, list, Account No. 520056.....	700.63	9,427.21
Deficiency of income tax.....		$ 3,475.57

Answer.

(Filed June 8, 1939)

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 98500

[SAME TITLE]

COMES NOW the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed herein, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1935, and denies the remaining allegations contained in paragraph 3 of the petition.

4. (a), (b) and (c) Denies the Commissioner erred as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. (a) Admits that petitioner during the years 1933, 1934 and 1935 owned, and still owns, certain mining property located at or near Kennecott, Alaska. Admits that during the years 1933, 1934 and 1935 petitioner conducted its business with net profits resulting in 1933 and 1935, and denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

29 (b) For lack of information from which to form a belief, denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that petitioner's Federal income tax return for the year 1935 reported a profit and net income, and denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

30 WHEREFORE, it is prayed that the petitioner's appeal be denied and the Commissioner's determination be sustained.

J. P. WENCHEL,
ECA
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
E. O. HANSON,
Division Counsel.
ALLEN T. AKIN,
Special Attorney,
Bureau of Internal Revenue.
jpm 6-5-39

Promulgated August 20, 1940.

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 98500.

[same title]

1. Deduction—Percentage Depletion—Election.—An election to take percentage depletion for 1933 and subsequent years does not carry over for 1934, since section 114 (b) (4) of the Revenue Act of 1934 required a new election.

2. *Id.*—An amended return for 1934 filed years after the 32
1934 return was due is not a "first return" within the meaning of section 114 (b) (4) of the Revenue Act of 1934.

3. *Id.*—The 1935 return is likewise not a "first return" where the property was owned during 1934, a return was required for that year, and it does not appear that the taxpayer would not have been entitled to a percentage depletion deduction for 1934.

For Petitioner: Paul E. Shorb, Esq.
For Respondent: Conway N. Kitchen, Esq.

The Commissioner determined a deficiency of $3,475.57 in income taxes for the calendar year 1935. The sole ques- 33
tion for decision is whether or not the petitioner is entitled to a deduction in the amount of $25,276.88 for that year for percentage depletion upon its copper mining properties, under section 114 (b) (4) of the Revenue Act of 1934.

Findings of Fact.

The petitioner is a corporation which was organized in 1919 under the laws of the State of Delaware. Its principal offices were in New York, New York. It filed its income tax return for the taxable year with the collector of internal revenue for the second district of New York. It reported net income upon that return after deducting

$25,276.88 for percentage depletion. The return contained a statement as follows:

> Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932 the taxpayer elected to deduct depletion on the percentage basis for the year 1933 and thereafter.

The following facts were stipulated:

> Petitioner during the years 1933, 1934, and 1935 owned, and still owns, certain copper mining property located at or near Kennecott, Alaska. Petitioner ac-
35 quired said mining property in 1919. During the years 1933, 1934, and 1935, petitioner was engaged in the business of mining and selling copper.
>
> During the year 1934, petitioner's property was shut down and petitioner did not mine any of its property during that year. Petitioner did, however, sell in 1934 certain copper which it had on hand and which had been mined in prior years.
>
> Petitioner had a profit from its mining operations in 1935 and reported a net income of $63,466.00 in its Federal income tax return for that year.
>
> In all returns of petitioner for years subsequent to 1935, it claimed depletion on the percentage basis.
>
> The petitioner was not entitled to any deduction for
36 depletion on a cost basis, for its mining property at Kennecott, Alaska, for the years 1933, 1934, and 1935.
>
> If petitioner is entitled to percentage depletion for the year 1935 under the provisions of Section 114 (b) (4) of the Revenue Act of 1934, the amount thereof is $25,276.88, as claimed by petitioner in its 1935 Federal income tax return; and, in such event there is no deficiency due from or refund due this petitioner for the year 1935.

The petitioner, on its Federal income tax return for 1933, deducted for depletion upon the percentage basis and stated: "Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932 the taxpayer elects to deduct de-

pletion on the percentage basis for the year 1933 and thereafter."

The petitioner filed its income tax return for 1934 on March 15, 1935, showing the following items of income and deductions:

GROSS INCOME.

1. Gross Sales		$81,887.37	
2. Less Cost of Goods Sold:			
(a) Inventory at beginning of year	$58,543.04		
(c) Miscellaneous costs	6,570.19		38
(d) Total	$65,113.23		
(e) Less inventory at end of year	10,916.22		
		54,197.01	
3. Gross Profit from Sales		$27,690.36	
7. Interest		42.26	
8. Rents		132.50	
14. Total Income			$27,865.12

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DEDUCTIONS.

19. Taxes		$7,291.44	
25. Other Deductions:			
N. Y. General Expense		15,029.36	
Selling Commission		1,217.75	
Delivery Expense on Refined Copper		1,854.89	
Shutdown Expense		41,369.94	
26. Total Deductions			$66,763.38
27. Net Income			$38,898.26

40 *Findings of Fact.*

Item 19. Taxes.—Was explained in schedule E as follows:

State of Delaware	$6,275.00
Capital Stock Tax	1,000.00
Territory of Alaska	15.00
Federal Check Tax	1.44
	$7,291.44

The return contains no further explanation of the items of income and deductions. No deduction of any kind for de-
41 pletion was claimed on that return. The treasurer of the petitioner prepared that return after reading the instructions attached thereto and section 114 (b) (4) of the Revenue Act of 1934. He believed that the election to take percentage depletion made on the 1933 return was still binding, the petitioner would not benefit from and was not entitled to any deduction for percentage depletion for 1934, and consequently, he made no reference to percentage depletion on the 1934 original return. The Commissioner made no adjustments for 1934.

A revenue agent's report dated January 19, 1939, first advised the petitioner that its claim for percentage deple-
42 tion for 1935 was to be disallowed. The petitioner filed a protest on January 27, 1939. The Commissioner mailed the notice of deficiency on February 18, 1939, disallowing the percentage depletion deduction for 1935 and explained:

> This office holds that under Section 114 (b) (4) of the Revenue Act of 1934 a new election of the basis for computing depletion is required and that the failure on your part to make an affirmative election in 1934 is in the terms of the Statute an election to compute depletion, without reference to percentage depletion. The method of computing depletion, having become fixed at

43

the time of filing the 1934 return, may not thereafter be changed in 1935. Since the allowable cost basis of depletable assets, plus the capitalized development costs was fully recovered though a cost basis depletion by 1925, it follows that no further depletion is allowable.

The petition in this proceeding was filed on May 12, 1939. The petitioner on May 29, 1939, filed an amended return for 1934 which was a duplicate of the original except that it contained a statement as follows:

Notice.

44

This taxpayer elects percentage depletion for this and all subsequent years thus reiterating its election of percentage depletion made in its 1933 return for 1933 and all subsequent years which included this year of 1934.

Opinion.

MURDOCK: The petitioner makes three arguments to support its claim for a percentage depletion deduction for 1935. One is that its election made on its 1933 return under the Revenue Act of 1932 was a continuing valid election to claim percentage depletion under section 114 (b) (4) of the Revenue Act of 1934. Another is that its amended return for 1934 was timely filed and constituted the "first return" under the Revenue Act of 1934, so that the election made therein to take percentage depletion for 1934 and subsequent years was an effective election under section 114 (b) (4) of the Revenue Act of 1934. The other argument is that the 1935 return was the "first return" within the meaning of section 114 (b) (4), since no depletion deduction upon a percentage basis was allowable for 1934.

45

The Board has held that the 1934 Act, in section 114 (b) (4)[1], required a new election by taxpayers as to whether or not they desired percentage depletion for 1934 and subsequent years. *Dorothy Glenn Coal Mining Co.*, 38 B. T. A. 1154; *C. H. Mead Coal Co.*, 38 B. T. A. 1163; reversed on other grounds, 106 Fed. (2d) 388. Thus the election made by this taxpayer in its return for 1933 does not constitute the election required by the Revenue Act of 1934.

The Supreme Court has held, in *Haggar Co.* v. *Helvering*, 308 U. S. 389, that the term "first return," as used in section 215 (f) of the National Industrial Recovery Act, 47 "means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year." The timely amended return in that case was filed within the time fixed by statute (and an extension thereof) for filing the return. The Court was not influenced by a later regulation providing that the value declared in the original return could not be changed by an amended return filed within the statutory limits. There is a reference in the opinion to *Mead Coal Co.* v. *Commissioner*, 106 Fed. (2d) 388, wherein the Circuit Court of Appeals for the Fourth Circuit held that an amended return for 1934, elect- 48

[1] SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * * * *

(b) BASIS FOR DEPLETION.—

(4) * * * A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

ing percentage depletion and filed before the return for 1935 was due, was sufficient to support a deduction of percentage depletion for 1934. See also *Del Mar Addition* v. *Commissioner*, ...Fed. (2d) ....(7/8/40). The Board, in *William B. Scaife & Sons Co.*, 41 B. T. A. 278, interpreted the *Haggar* decision as recognizing only an amended return filed within the time for filing the return for the period and held that one filed thereafter was ineffective. The Circuit Court of Appeals for the Ninth Circuit, in *Riley Investment Co.* v. *Commissioner*, 110 Fed. (2d) 655, made a similar interpretation of the *Haggar* decision and expressed disapproval of the test of timeliness given in the *Mead* case. The petitioner in the *Riley* case was engaged in mining gold. It had exhausted its cost basis for depletion and claimed no deduction for depletion on its return for 1934. It filed an amended return on March 3, 1936, electing and claiming percentage depletion. The court held that the amended return was not timely and did not entitle the taxpayer to percentage depletion. The opinion contains a discussion of several of the points urged by the present petitioner. The Board held in *Walter C. Hill*, 41 B. T. A. 245, that an amended return, filed after the return for the next year was due, was ineffective for making an election of percentage depletion under section 114 (b) (4).

The amended return of the present petitioner for 1934 was filed on May 29, 1939, more than four years after the time for filing the return for 1934, more than four months after it learned that its percentage depletion for 1935 might be disallowed, more than three months after the deficiency notice for 1935 was mailed, and after the petition in this case was filed. It was not timely filed and was not the first return for 1934 within the meaning of section 114 (b) (4). *Riley Investment Co.* v. *Commissioner, supra; Walter C. Hill, supra;* Cf. *William B. Scaife & Sons Co.*,

supra. The conclusion is also supported by *Mead Coal Co.* v. *Commissioner, supra.*

The remaining argument of the petitioner is that its return for 1935 was its "first return" within the meaning of section 114 (b) (4) of the Revenue Act of 1934, since it was the first return under that provision in which it was entitled to any deduction for percentage depletion. This argument is based upon the conclusion that no deduction for percentage depletion was allowable for 1934. The petitioner merely points to the net loss for 1934. The net loss shows that a
53 deduction for percentage depletion in 1934 would not have reduced taxes for 1934 but it does not show that such a deduction was not allowable under the statute.

Section 114 (b) (4) allowed a deduction of 15 per centum "of the gross income from the property during the taxable year" but not to "exceed 50 per centum of the net income * * * from the property" excluding depletion. The terms "gross income from the property" and "net income from the property" are not necessarily synonymous with the terms "Gross Income" and "Net Income" appearing on the return. Cf. *Consumers Natural Gas Co.*, 30 B. T. A. 1263; affd., 78 Fed. (2d) 161; certiorari denied, 296 U. S.
54 634. See Regulations 86, article 23 (m)-1, defining gross and net income from the property. The record shows that the petitioner had gross income from the property which would support a deduction for percentage depletion and it fails to show that there was no net income from the property for 1934. Not all deductions shown upon a return are necessarily deductible in determining net income from the property, since only those are deductible which are attributable or properly allocable to the mineral property and process upon which the depletion is claimed. Regulations 86, art. 23 (m)-1. Cf. *Vinton Petroleum Co. of Texas*, 28 B. T. A. 549; affd., 71 Fed. (2d) 420; *Consumers Natural Gas Co., supra; Ambassador Petroleum Co.*, 28 B. T. A.

868; *Houston Production Co.* v. *United States*, 4 Fed. Supp. 715; *Brea Canon Oil Co.*, 29 B. T. A. 1134; affd., 77 Fed. (2d) 67; certiorari denied, 296 U. S. 604; *Greensboro Gas Co.*, 30 B. T. A. 1362; affd., 79 Fed. (2d) 701; certiorari denied, 296 U. S. 639.

The record does not show whether or not the petitioner had other properties in 1934, or what part of the taxes might be deductible in computing net income from the property upon which depletion is being claimed. The same is true of the item "N. Y. General Expense." "Selling Commission" and "Delivery Expense on Refined Copper" are not further explained. 56 We may not assume, in the absence of proof, that those items are deductible in their entirety, or in any particular part, in the computation of "net income from the property." The same and more may be said in regard to the large item of "Shutdown Expense." The meager description given of that item strongly suggests that it is not all deductible in determining net income from the property for 1934. The copper sold in 1934 was mined previously. Should the entire shutdown expense be charged against 1934 sales? Did the petitioner refine its copper, and, if so, what allocation of income and deductions would that require.

The petitioner has failed to show that it would not have been entitled to any percentage depletion deduction for 1934 under section 114 (b) (4) and the main support of its third argument must fall. 57 Furthermore, there is language in the *Dorothy Glenn Coal Mining Co.* case, *supra*, and in *Kehoe-Berge Coal Co.*, 41 B. T. A. 282, which may mean that the election must be made for 1934 and that no election made in a later return will do, where the property was owned in 1934 and an election could have been made upon the return for that year.

The legislative history of the provision and its effect upon taxpayers situated like the present one has been fully

58 *Decision.*

considered and discussed in prior opinions cited herein. Since this petitioner did not make the election required by section 114 (b) (4), it may not have any deduction for percentage depletion for 1935.

Decision will be entered for the respondent.

Decision.

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

59 DOCKET No. 98500

[SAME TITLE]

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion, promulgated August 20, 1940, it is

ORDERED and DECIDED: That there is a deficiency in income of $3,475.57 for the year 1935.

Entered Aug. 26, 1940.

(Signed) J. E. MURDOCK,
Member.

60

United States Board of Tax Appeals Filed Sep 19 1940
Denied Sep 21 1940 (Signed) J. E. Murdock, Member U. S. Board of Tax Appeals

61

Motion to Vacate Decision and Modify the Findings of Fact and Opinion of Board, or for Further Hearing to Supplement and Enlarge the Record.

(Filed Sep. 19, 1940)

UNITED STATES BOARD OF TAX APPEALS

DOCKET No. 98500

[SAME TITLE]

Now comes the petitioner by its attorney, Paul E. Shorb, and respectfully moves, 62

(1) That the Board vacate the decision entered in this proceeding and modify the Findings of Fact and Opinion entered August 20, 1940 (42 B. T. A. No. 90); or

(2) That further hearing be granted in this proceeding for the purpose of supplementing and enlarging the record by way of further testimony or stipulation of the parties.

In support of this motion petitioner states:

The sole question involved in the case is whether petitioner is entitled to percentage depletion for the year 1935. The petitioner advanced three grounds in support of its claim. The Board rejected all three. 63

The present motion concerns only the rejection of the *third* point. This third point was that the petitioner was entitled to percentage depletion because, within the meaning of Section 114 (b) (4) of the Revenue Act of 1934, the petitioner's return for 1935 was the "first return", filed under that Act, since the mining property was not operated in 1934 and petitioner having sustained a net loss in that year was not entitled to an allowance for percentage depletion. The petitioner argued that the expression "first return" must mean a return in a year when the taxpayer has net income.

The Board did not decide the validity of this legal contention but ruled against the petitioner by saying that it was not clear from the record that the petitioner was not "entitled to any percentage depletion deduction for 1934 under Section 114 (b) (4) * * *". The Board took the position that the petitioner's expenses and other deductions claimed in its 1934 return might have arisen from other properties or from refining operations, or might be applicable to other years and thus might not be deductible in computing net income for the year 1934 from the property as to which percentage depletion is claimed. Respon-
65 dent did not raise these questions. In so ruling petitioner believes the Board misunderstood the Stipulation (R. 25-26) in this case and other evidence in support of petitioner's argument on this point. Accordingly, for the reasons hereinafter given, the petitioner now moves:

1. *That the Board vacate its decision and modify its findings of fact and opinion entered in this case.* The petitioner submits that the record shows that the mining property in question upon which the petitioner claims an allowance for percentage depletion was the *only* property owned by petitioner, that petitioner was *not* engaged in refining, and that
66 all deductions listed in petitioner's 1934 return were properly allocable to 1934 and to this one mining property.

(a) The case was argued on the basis that the company owned only *one* property. Counsel for respondent did not dispute the fact or suggest the contrary. Counsel for petitioner in presenting the case consistently referred to "the" mine, "the" property. Mr. Dean, in his testimony, referred to the petitioner's "mine" and the "company's property" (R. 31, 32, 34). In preparing the stipulation the singular "property" was intentionally used by petitioner's counsel in order to make the fact clear that the petitioner had only one mine and one depletable property during the years

1933, 1934 and 1935, and mined only one mine or property. The stipulation speaks only of "the" property. (R. 25-26) It is believed respondent's counsel so understood the situation. In any event, petitioner's counsel feels certain that such explanation was made during the negotiations between the parties with respect to the stipulation set out in the Record, pages 25-26.

Further, "Schedule J—depletion" attached to petitioner's income and excess profits tax returns for 1933 contains statement referring to "gross sales of products of the mine" (Ex. 4). Likewise, Exhibit 3, the 1935 income tax 68
return, contains similar statement referring to "gross sales of product of mine".

The record, we submit, fairly supports a finding that petitioner had only one property. Petitioner accordingly moves that the Board so find.

(b) The record is even clearer that the petitioner was *not engaged in refining*. It was stipulated by the parties that during the years 1933, 1934 and 1935, petitioner was engaged in the *business of mining and selling copper* (R. 25). In petitioner's original and amended 1934 income tax returns (Exs. 1 and 2) petitioner's business is stated to be 69
"copper mining"; also as "mining and quarrying". Petitioner's income tax returns for 1933 and 1935 (Exs. 3 and 4) likewise report petitioner's business as that of "copper mining". In those returns the petitioner's total gross income is reported as "gross sales of products of mine". Deductions were taken therein for smelting and refining in determining petitioner's gross income from its *property*, but this means money paid to *others* for refining. The petitioner did no refining itself.

When the parties agree as to the business of the petitioner for these years, which agreement excludes that of refining, petitioner submits the Board should find petition-

er's business to be as stipulated. The stipulation of the parties obviously was drawn with the intent of excluding matters not covered thereby. The tax returns of petitioner for 1933, 1934 and 1935 which are part of the record in this appeal show no depreciation deduction whatsoever. It seems clear that if the petitioner had operated a refinery there would be such a deduction. Further, refining costs, had petitioner operated its own refinery, would be reflected in Item 2 of the Corporation Income and Excess Profits Tax return with reference to the "cost of goods sold". Petitioner's returns for 1933, 1934 and 1935 show no such cost
71 of manufacturing, *i. e.*, refining. The refining cost of petitioner is shown on Schedule J. which is the percentage depletion computation, and such cost is thus shown in petitioner's 1933 and 1935 returns, and establishes "refining" as an expense or item *paid* by petitioner to others, which is deductible, as there shown, from the "gross sales of the products of the mine".

Upon the basis of the present record which, we submit, clearly establishes the fact that petitioner was engaged solely in copper mining, petitioner respectfully moves that the Board vacate and modify its report on this point and affirmatively find that petitioner did not refine its copper
72 and that therefore no "allocation of income and deductions", as suggested in the Board's opinion, is required.

(c) Petitioner further submits that the Board should modify its findings of fact and opinion to show that petitioner had no net income from its mining property in 1934 and was not entitled to deduct an allowance for percentage depletion in that year. Petitioner's return for 1934 (Ex. 1) disclosed a *net loss* of $38,898.26 in that year. Further, Mr. Dean testified that the petitioner had *no income in 1934* or any right to deduct percentage depletion in that year (R. 30, 32). Petitioner's determination has never been controverted or disputed by respondent. Petitioner's 1934

income tax return which reported a *net loss* of $38,898.26 was "reviewed" by respondent and no adjustments were made therein by him (Ex. 1). Thus the respondent, who by statute was charged with the duty of determining petitioner's correct tax liability (Sec. 57, Revenue Act of 1934), approved petitioner's determination that it had no net income in 1934. We submit that the fact that the Company had a net loss in 1934 is proved conclusively by petitioner's 1934 income tax return and by the testimony of the witness, Dean.

The record discloses that all the expense items shown in the petitioner's 1934 return were properly allocable to this one property, and to the year 1934. The Board suggests that such items as "Taxes", "New York General Expense", "Selling Commissions", "Delivery Expenses" should not be charged against this one property, and that "Shut Down Expense" should not in whole be charged to the year 1934. Since the company was engaged solely in mining, and in mining the one property, *all* the company's taxes and expenses, including "New York General Expense", "Selling Commissions", "Delivery Expense", are properly chargeable against this one property in determining whether there was "net income" from the property. 74

Petitioner's returns for 1933, 1934 and 1935 all contain deductions for "New York General Expense", "Selling Commissions", "Delivery Expense" and "Taxes". The record definitely shows that these items were allowed as deductible expense in these years. A comparison of the 1935 return and figures thereon with the Revenue Agent's reports of January 25, 1937, and January 19, 1939, 90-day statutory deficiency notice, and the Stipulation of the parties in this definitely establishes that the respondent has not questioned the deductibility of such items for either 1933, 1934 or 1935. 75

Nor does the Board's point as to "Shut Down Expense" stand any better. The question is raised, "Should the entire shut down expense be charged against 1934 sales?". The answer is that the record is conclusive upon that point. At the trial petitioner's return for 1934 (Ex. 1), showing a net loss of $38,898.26, was introduced in evidence. That net loss was arrived at after deducting a number of items, including "Shut Down Expense of $41,369.94". This was the return for the year 1934, and it contained that item as an expense *for that year*. This deduction was never questioned by respondent. No point was raised at the trial,
77 and no objection made.

Petitioner's 1935 return, Exhibit 3, shows "Shut Down Expense" $9,000.15. The Revenue Agent's report of January 25, 1937, for the year 1935, Exhibit 5, shows that of this amount, $7,784.65 was disallowed as a deduction because " * * * the records show that the above amount applicable to the year 1934 was taken as a deduction for the year 1934 * * *". The audit of the 1935 return therefore discloses that the Commissioner considered "Shut Down Expense" and allowed part of the amount claimed for 1935, but disallowed the remainder, because it was "applicable to the year 1934". Thus it is shown that the "Shut
78 Down Expense" item was, during the audit of the 1935 case, considered by the Commissioner and his determination was that part of the item was deductible in 1935 and the balance "applicable" to the year 1934.

For the reasons set forth above we submit the present record clearly establishes the fact that the following deductions claimed by petitioner in its 1934 income tax return are chargeable against petitioner's one property in 1934

in determining whether petitioner had net income therefrom:

Taxes	$7,291.44
New York General Expense	15,029.36
Selling Commissions	1,217.75
Delivery Expense on Refined Copper	1,854.89
	$25,393.44

The Commissioner having determined in petitioner's 1935 case that at least $7,784.65 of said shut down expense was "applicable to the year 1934", there are 1934 *deductions totaling $33,178.09,* which are clearly allocable to petitioner's property, which total exceeds by $5,312.97 petitioner's gross income from its property of $27,865.12, as reflected in its 1934 return. Thus petitioner had a "net loss" from its property in 1934 without giving consideration to petitioner's right to a greater deduction in 1934 on account of "Shut Down Expense". Thus analyzed, we submit the entire record conclusively establishes the fact that petitioner had no net income from its property in 1934, *and therefore no deduction for percentage depletion was allowable in that year.* 80

With respect to petitioner's 1934 return the Board, as pointed out above, found "The Commissioner made no adjustments for 1934". The return itself shows that it was "reviewed" by Section A, Bureau of Internal Revenue. Under the law, the Commissioner is charged with the duty of such audit and review (see petitioner's brief, page 14). The presumption is that the Commissioner has done his duty and the facts here show that the 1934 return was considered by him and no adjustment made therein. Respondent raised no question on this issue, nor did the 90-day deficiency letter to petitioner from which this appeal was taken. Accordingly, it is submitted the present record establishes *prima facie* the fact that petitioner had no net 81

income from its property in the year 1934. In establishing a *prima facie* case in support of its contention, petitioner is not required to eliminate all unfavorable possibilities. *Van Vorst* v. *Commissioner*, 22 B. T. A. 632, 635, aff'd 59 F. (2d) 968 (C. C. A. 9). Accordingly, we respectfully urge the Board to modify its findings of fact and opinion in this appeal to show that petitioner had no net income from its property in 1934.

2. If the Board does not see fit to grant the motion under 1, *supra, then the petitioner respectfully moves that*
83 *the Board grant further hearing in this proceeding* for the purpose of enabling the petitioner to supplement and enlarge the present record by testimony or by stipulation of the parties on the facts relating to the points discussed herein. For the reasons stated herein, petitioner believed that the record was clear with respect to these points, and the case was tried upon that basis. In order to avoid injustice and hardship resulting from a misunderstanding as to the scope of the record, it is requested that the Board grant a further hearing in this proceeding so that the parties may have an opportunity to supplement and enlarge the record on these particular issues. We submit the
84 present record clearly justifies the petitioner in making this motion which finds ample support in numerous court decisions. It is elemental that the courts, upon review of decisions of the Board of Tax Appeals, will order a rehearing when necessary to meet the ends of substantial justice. *Chatham Phenix National Bank & Trust Co.* v. *Helvering*, 87 F. (2d) 547 (App. D. C.); and in the exercise of their appellate power the courts have, under varying factual situations remanded cases to the Board for further hearing where the record was not in condition for the court to do justice to all parties or where justice required such action. *Underwood* v. *Commissioner*, 56 F. (2d) 67, 73 (C. C. A. 4); *Virginia-Lincoln Furniture Corporation* v.

Commissioner, 56 F. (2d) 1028 (C. C. A. 4); *Wyoming Investment Co.* v. *Commissioner*, 70 F. (2d) 191 (C. C. A. 10); *Helvering* v. *Edison Securities Corporation*, 78 F. (2d) 85, 90-91 (C. C. A. 4). The equal power of the Board to do full justice to the parties while they are still before it cannot be doubted.

The present case, we submit, falls squarely within the limits of the decision of the United States Circuit Court of Appeals for the Eighth Circuit in *National Lumber & Tie Co.* v. *Commissioner*, 90 F. (2d) 216. In that case the Board had held that upon the evidence submitted by the taxpayer it had failed to establish its contention that certain levee taxes were capital expenditures; also that the taxpayer had failed to show what portion of the taxes were allocable to maintenance or interest charges. There was some evidence in the record which tended to support the taxpayer's contention. The Court held that the Board should have afforded the taxpayer an opportunity of showing the character of the taxes paid by it, and the case was accordingly remanded for further hearing.

We submit the Court's reasoning in the above case is directly applicable to the present case and supports the granting of petitioner's motion so that the record may be clarified. See also *Ray W. Torrey Co.* v. *Commissioner*, 84 F. (2d) 659 (C. C. A. 6). As stated by the Court in *Chatham Phenix National Bank & Trust Co.* v. *Helvering*, *supra* (p. 550):

> "Running through all the cases cited is the similar determination of the courts that, where it appears that a further hearing would be promotive of justice, the taxpayer should be given the opportunity of amending his pleadings and of offering evidence to show that he suffers through a wrongful determination of his tax liability."

We submit that elementary principles of justice should accord this petitioner an opportunity of presenting the true facts in order that the legal question (an important one) may receive due consideration. The granting of this motion by the Board in the exercise of its sound discretion is consonant with the remedial purposes of the legislation creating the Board of Tax Appeals. *Helvering* v. *Taylor*, 293 U. S. 507, 516.

Respectfully submitted,

89 PAUL E. SHORB,
701 Union Trust Building,
Washington, D. C.,
Counsel for Petitioner.

Petition for Review.

(Filed Nov. 26, 1940.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

90 B. T. A. Docket No. 98500.

[SAME TITLE]

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

Now comes Mother Lode Coalition Mines Company, the petitioner herein, by and through its attorney, Paul E. Shorb, and respectfully shows:

I.

Jurisdiction.

The petitioner on review is a corporation, organized in 1919 under the laws of the State of Delaware with its principal offices at 120 Broadway, New York, New York. The petitioner filed its Federal income tax return for the year 1935 with the Collector of Internal Revenue for the Second District of New York, whose office is located within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit. The respondent on review is the duly appointed, qualified and acting Commissioner of Internal 92
Revenue, hereinafter referred to as the respondent, appointed and holding his office by authority of the laws of the United States. The petitioner files this petition for review pursuant to the provisions of Section 1141 and Section 1142 of the Internal Revenue Code. The court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Second Circuit.

II.

Nature of Controversy.

The nature of the controversy is as follows: 93

The petitioner during the years 1933, 1934, and 1935 owned and still owns one certain copper mine located at or near Kennecott, Alaska, which was acquired in 1919. During the years 1933, 1934, and 1935 petitioner was engaged in the business of mining and selling copper from said mine. In its Federal income tax return for 1933 petitioner computed and deducted an allowance for depletion on its said mine upon the percentage basis, and in said return petitioner stated:

"Under the provisions of Section 114(b)(4) of the Revenue Act of 1932 the taxpayer elects to deduct de-

pletion on the percentage basis for the year 1933 and thereafter."

Petitioner was not entitled to a deduction for depletion computed upon any other basis.

Petitioner's said mine was shut down and was not operated in 1934; however in that year petitioner sold certain copper which it had on hand and which had been taken from said mine in prior years. In 1934 petitioner sustained a net loss of $38,898.26 without reference to any allowance for depletion and in its income tax return for that year
95 which reported said net loss, petitioner claimed no depletion deduction. Petitioner had no net income from its mine in 1934 and was not entitled to any deduction for percentage depletion on its said mine and having previously elected percentage depletion for 1933 and subsequent years, which election was still effective, petitioner concluded that no further action was required of it with reference to percentage depletion. Petitioner's 1934 return was reviewed by respondent and no adjustments were made by him.

Petitioner had a profit from operating said mine in 1935 and reported net income of $63,466.00 in its Federal income tax return for that year after deducting $25,276.88 for per-
96 centage depletion. In this return petitioner stated that under Section 114(b)(4) of the Revenue Act of 1932 it elected to deduct depletion on the percentage basis for 1933 and thereafter. Petitioner's return for 1935 was the first return filed by it under the Revenue Act of 1934 which reported net income subject to an allowance for percentage depletion.

On February 18, 1939, the respondent mailed to the petitioner a notice of deficiency for Federal income taxes for the calendar year 1935 in the amount of $3,475.57. In his notice of deficiency the respondent stated:

"This office holds that under Section 114(b)(4) of the Revenue Act of 1934 a new election of the basis for

computing depletion is required and that the failure on your part to make an affirmative election in 1934 is in the terms of the statute an election to compute depletion without reference to percentage depletion. The method of computing depletion, having become fixed at the time of filing the 1934 return, may not thereafter be changed in 1935. Since the allowable cost basis of depletable assets, plus the capitalized development costs, was fully recovered through a cost basis depletion by 1925, it follows that no further depletion is allowable."

Respondent accordingly disallowed the deduction for percentage depletion which petitioner had claimed in its 1935 return and determined a deficiency in tax for said year of $3,475.57. 98

On May 12, 1939, the petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of the respondent's determination of deficiency. In its petition petitioner alleged that in its 1933 return it had elected percentage depletion for 1933 and subsequent years; that in 1934 it had no net income subject to percentage depletion, but on the contrary had sustained a net loss and therefore was not entitled to deduct an allowance for percentage depletion for 1934; that petitioner had elected as required by law to have its depletion allowance for its said mine computed with reference to percentage depletion and that it is entitled to percentage depletion for the year 1935. On May 29, 1939, petitioner filed an amended return for 1934 which stated that petitioner elected percentage depletion for 1934 and subsequent years, thus reiterating its prior election. Respondent's answer to the petition was filed on June 8, 1939. 99

The case was tried before the Board on April 30, 1940. On August 20, 1940, the Board promulgated its findings of fact and opinion, (42 B. T. A. 596), wherein it held that the election by the petitioner of percentage depletion in its

return for the year 1933 and subsequent years was not sufficient to entitle the petitioner to percentage depletion for 1935; that the petitioner was required under the 1934 Act to make an election of percentage depletion in its original 1934 return in order to be permitted percentage depletion in 1935; that it had failed to make such election and accordingly was not entitled to an election for percentage depletion for 1935.

The Board also denied the petitioner's contention that since it had no net income in the year 1934, and therefore no right to deduct an allowance for percentage depletion
101 in that year, its return for the year 1934 was not its "first return" in which it could elect percentage depletion within the definition of Section 114(b)(4), Revenue Act of 1934, but that its original return for 1935 in which petitioner elected percentage depletion and reaffirmed its 1933 election of percentage depletion, was the "first return" under the Revenue Act of 1934. On this issue the Board held that the evidence was not sufficient to show that the petitioner had no net income from its said mine in 1934, although the record showed that petitioner had no net income in 1934 subject to an allowance for percentage depletion, which fact was never controverted by respondent, and further, that in any
102 case whether or not the petitioner had any net income in 1934, it was obliged to claim depletion in its original 1934 return in order to be entitled to percentage depletion in the year 1935. On August 26, 1940, the Board entered its decision that there was a deficiency in petitioner's income tax of $3,475.57 for the year 1935.

On September 19, 1940, the petitioner filed with the Board a motion to vacate the decision and modify the findings of fact and opinion of the Board, or for a further hearing permitting it to produce further and additional evidence showing that it had no net income from its said mine for the year 1934, in which case the petitioner's return for 1935

was the "first return" within the definition of Section 114(b)(4), Revenue Act of 1934. Without hearing, this motion was denied by the Board on September 21, 1940. On September 19, 1940, petitioner also filed a motion for review by the Full Board of the Decision and Report of the Division. This motion, without hearing, was also denied on September 24, 1940.

III.
Assignments of Error.

The petitioner avers that in its Findings of Fact, Opinion and Decision the United States Board of Tax Appeals committed the following errors upon which your petitioner relies as the basis of this proceeding. 104

1. The Board of Tax Appeals erred in holding and deciding that there is a deficiency in income tax owing by the petitioner in the amount of $3,475.57 for the year 1935.

2. The Board of Tax Appeals erred in holding and deciding that petitioner is not entitled to a deduction for percentage depletion in determining its taxable income for 1935.

3. The Board of Tax Appeals erred in holding and deciding that the petitioner did not make an election of percentage depletion as required by Section 114(b)(4), Revenue Act of 1934. 105

4. The Board erred in holding and deciding that the election made by petitioner in its Federal income tax return for 1933 was not sufficient to entitled the petitioner to percentage depletion for the year 1935.

5. The Board of Tax Appeals erred in failing to hold that petitioner's election of percentage depletion under Section 114(b)(4), Revenue Act of 1932, for 1933 and subsequent years constituted, under the facts of this case, a

106 *Petition for Review.*

valid and binding election of percentage depletion for 1934 and 1935.

6. The Board of Tax Appeals erred in holding and deciding as a matter of law that Section 114(b)(4), Revenue Act of 1934, required a new election of percentage depletion from petitioner, which under the Revenue Act of 1932, had elected percentage depletion for 1933 and subsequent years.

7. The Board erred in failing and refusing to hold that the election of percentage depletion made by petitioner in its 1933 income tax return was a continuing and valid elec-
107 tion to claim percentage depletion under Section 114(b)(4), Revenue Act of 1934.

8. The Board erred in failing to hold that petitioner's income tax return for 1935 was the "first" return filed under Section 114(b)(4), Revenue Act of 1934, in which petitioner could or was entitled to elect percentage depletion, and that petitioner's election of percentage depletion in its 1935 return constituted, under the facts of this case, a valid election of percentage depletion under Section 114(b)(4), Revenue Act of 1934.

9. The Board of Tax Appeals erred in holding and de-
108 ciding that petitioner's income tax return for 1935 was not its "first return" within the meaning of Section 114(b)(4), Revenue Act of 1934.

10. The Board of Tax Appeals erred in failing to hold that petitioner had no net income from its said mine in 1934, and in failing to hold that petitioner had a net loss from its mine in 1934 as reported by petitioner in its 1934 return.

11. The Board of Tax Appeals erred in failing to hold that petitioner was not entitled to any deduction for percentage depletion for 1934.

12. The Board erred in holding that the record in this case does not show whether or not petitioner had more than one mining property in 1934 or whether or not the deductions claimed by petitioner in its 1934 return are deductible in their entirety in determining the net income from petitioner's property for 1934.

13. The Board of Tax Appeals erred in failing to find and hold that petitioner had only one mining property in 1934.

14. The Board erred in failing to find and hold that petitioner in 1934 was engaged solely in copper mining and was 110
not engaged in refining.

15. The Board of Tax Appeals erred in failing to find and hold that the deductions claimed by petitioner in its 1934 income tax return were deductible in their entirety in computing net income for said year from petitioner's mine upon which depletion is claimed.

16. The Board of Tax Appeals erred in holding that the record failed to show that there was no net income from petitioner's said mine in 1934.

17. The Board of Tax Appeals erred in holding that 111
petitioner had failed to show that it was not entitled to any percentage depletion deduction for 1934 under Section 114(b)(4), Revenue Act of 1934.

18. The Board of Tax Appeals erred in denying petitioner's motion to vacate and modify the Board's Findings of Fact and Opinion, or for further hearing to supplement and enlarge the record.

19. The Board of Tax Appeals erred in refusing to grant petitioner the opportunity and right upon a further hearing, as requested by petitioner in its motion for further hearing to supplement and enlarge the record, to produce

further and additional evidence that it had no net income from its said mine in 1934.

20. The Board of Tax Appeals erred in that its decision is not supported by and is contrary to the evidence.

21. The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is no deficiency in petitioner's income tax liability for 1935.

WHEREFORE, the petitioner petitions that the decision of the United States Board of Tax Appeals be reviewed by
113 the United States Circuit Court of Appeals for the Second Circuit, that a transcript of record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

PAUL E. SHORB
701 Union Trust Building
Washington, D. C.
Counsel for Petitioner.

COVINGTON, BURLING, RUBLEE,
114 ACHESON & SHORB
Of Counsel.

District of Columbia, ss:

PAUL E. SHORB, being first duly sworn, says that he is counsel of record in the above-named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements made therein, and that the statements made are true to the best of his knowledge, information and belief.

PAUL E. SHORB

Subscribed and sworn to before
me this 26th day of November, 1940.

MARJORY E. WOOD
Notary Public, D. C.

My Commission Expires July 15, 1944.
(Seal)

Notice of Filing Petition for Review.

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(Filed Nov. 26, 1940)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. DOCKET No. 98500.

[SAME TITLE]

To:

117

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue,
Washington, D. C.

You are hereby notified that the petitioner, Mother Lode Coalition Mines Company, did on the 26th day of November, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board of Tax Appeals heretofore rendered in the above-entitled cause. A copy of

118 *Statement of Evidence.*

the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 26th day of November, 1940.

PAUL E. SHORB
701 Union Trust Building
Washington, D. C.
Counsel for Petitioner.

Personal service of the above and foregoing notice, together with a copy of the petition for
119 review and assignments of error mentioned therein, is hereby acknowledged this 26th day of November, 1940.

J. P. WENCHEL,
Counsel for Respondent.

Statement of Evidence.

(Lodged July 11, 1938)

(Filed July 12, 1941)

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(Filed July 11, 1941)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

B. T. A. DOCKET No. 98500.

[SAME TITLE]

The following is a statement of evidence submitted to and proceedings had at the hearing before the Board of Tax Appeals in the above-entitled cause.

The above entitled proceeding came on for hearing on April 30, 1940, at New York, New York, before the Honorable J. Edgar Murdock, Member of the United States Board of Tax Appeals. The petitioner appeared by its attorney, Paul E. Shorb, and the respondent appeared by his attorney, Conway N. Kitchen, and Honorable J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue.

Offers in Evidence.

Counsel for petitioner offered and the Board received in evidence the following exhibits: 122

Petitioner's Exhibit 1. The original corporation income and excess profits tax return filed by petitioner for the year 1934. Said return was reviewed and audited by respondent and no changes or adjustments were made therein. A true and correct copy of said exhibit is attached hereto and made a part of this statement of evidence.

Petitioner's Exhibit 2. The amended corporation income and excess profits tax return of petitioner for the year 1934, which was filed with the Collector of Internal Revenue, Second District of New York on May 29, 1939, and by him forwarded to the respondent on June 2, 1939. Said amended return is identical with petitioner's original 123 return for 1934 except that it contains the following notice:

> "This taxpayer elects percentage depletion for this and all subsequent years thus reiterating its election of percentage depletion made in its 1933 return for 1933 and all subsequent years which included this year of 1934."

Petitioner's Exhibit 3. The corporation income and excess profits tax return of petitioner for the year 1935 together with an attached depletion schedule. A true and correct copy of said exhibit is attached hereto and made a part of this statement of evidence.

124 *Statement of Evidence.*

Petitioner's exhibit 4. The corporation income and excess profits tax return of petitioner for the year 1933 with depletion schedule attached thereto. A true and correct copy of said exhibit is attached hereto and made a part of this statement of evidence.

Petitioner's exhibit 5. The Revenue Agent's report dated December 31, 1936, on petitioner's 1935 return together with letter dated January 25, 1937, of the Internal Revenue Agent transmitting said report to petitioner. A true and correct copy of said exhibit, excluding page 2 thereof, which relates to instructions for the preparation
125 of protest to said report, and which is not material upon this appeal, is attached hereto and made a part of this statement of evidence.

Petitioner's exhibit 6. The Revenue Agent's report dated January 19, 1939, on petitioner's 1935 return. A true and correct copy of said exhibit excluding pages 2, 3, and 4 thereof, which relate to form of waiver, statement of instructions, and form of receipt evidencing receipt of the Revenue Agent's report, which pages are not material upon this appeal, is attached hereto and made a part of this statement of evidence.

Petitioner's exhibit 7. Petitioner's protest filed with the
126 Revenue Agent in Charge, Second New York Division, on January 27, 1939, to the Revenue Agent's report of January 19, 1939. A true and correct copy of said exhibit is attached hereto and made a part of this statement of evidence.

Petitioner's exhibit 8. A blank form of the respondent's corporation income and excess profits tax return (Form 1120) for the calendar year 1933 to which form was attached respondent's sheet of instructions for preparing returns, which contained the following instruction with reference to depletion:

"23 Depletion.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous nonmetals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932."

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Petitioner's Exhibits 9 and 10. Blank forms of the respondent's corporation income and excess profits tax returns (Form 1120) for the calendar years 1934 and 1935, respectively, to which forms were attached respondent's sheet of instructions for preparing said returns. The instructions on said forms with reference to depletion are identical with the instructions contained in the 1933 form except that the latter instructions refer to Section 23(m) and Section 114 of the Revenue Act of 1934 rather than to Section 23(l) and Section 114 of the Revenue Act of 1932.

Counsel for petitioner then read into the record and there was received in evidence the following oral stipulation of facts which was agreed to by counsel for petitioner and respondent: 129

"Petitioner during the years 1933, 1934, and 1935 owned, and still owns, certain copper mining property located at or near Kennecott, Alaska. Petitioner acquired said mining property in 1919. During the years 1933, 1934, and 1935, petitioner was engaged in the business of mining and selling copper.

During the year 1934, petitioner's property was shut down and petitioner did not mine any of its property during that year. Petitioner did, however, sell in 1934 certain copper which it had on hand and which had been mined in prior years.

130 *Statement of Evidence.*

Petitioner had a profit from its mining operations in 1935 and reported a net income of $63,466.00 in its Federal income tax return for that year.

In all returns of petitioner for years subsequent to 1935, it claimed depletion on the percentage basis.

The petitioner was not entitled to any deduction for depletion on a cost basis, for its mining property at Kennecott, Alaska, for the years 1933, 1934, and 1935. If petitioner is entitled to percentage depletion for the year 1935 under the provisions of Section 114(b)(4) of the Revenue Act of 1934, the amount thereof is $25,276.88, as claimed by petitioner in its 1935 Federal income tax return; and, in such event there is no de-
131 ficiency due from or refund due this petitioner for the year 1935."

Thereafter Mr. James Dean, having been first duly sworn as a witness on behalf of the petitioner, testified as follows:

Direct Examination.

I live at Tenafly, New Jersey. My business is copper mining. I am the treasurer of the petitioner and have held that position since 1923. As treasurer I take care of petitioner's income tax returns, review them, see that they are
132 properly filed and I have charge of other financial matters. I aided in the preparation of petitioner's 1933 income tax return and reviewed it before filing.

In that return we gave very serious consideration to the matter of the deduction of depletion. We had run out of cost depletion and in order to get any depletion deduction at all we had to make an election in that year to take percentage depletion. We discussed the matter of percentage depletion and we decided to take percentage depletion for 1933 and thereafter. I wrote the rider attached to the 1933 return and I remember putting for that year and thereafter. By "thereafter" was meant all succeeding years. I thought we had made an election for them.

I am also familiar with the preparation and filing of petitioner's 1934 income tax return. There was no depletion deduction in the 1934 return. A percentage depletion deduction was not claimed in petitioner's 1934 return because we had considered the entire matter; we had exhausted our cost depletion, we had no income in 1934 so we could not make any deduction for depletion. In reaching that decision we considered the election we had made in our 1933 return and we thought we had made a binding election for succeeding years. 133

I read the instruction sheets on the 1933, 1934, and 1935 returns (Form 1120). We did not file for the years 1933, 1934, or 1935 any Form D referred to in the instructions in the case of metal mines as that form is a valuation form which we had filed in prior years and it was not necessary to file one for 1933, 1934, or 1935. 134

The petitioner ceased to operate its mine at Kennecott, Alaska, involved in this proceeding, in August, 1938.

Cross Examination.

I testified that I read the instructions contained on petitioner's returns for the years 1933, 1934, and 1935. I think I looked at Section 114 of the Revenue Act of 1934 after I read the instructions attached to the 1934 return. 135

Redirect Examination.

After I looked at Section 114(b)(4) of the Revenue Act of 1934, we concluded that as we had made an election for 1933 which we considered to be a binding election for 1933 and thereafter, that we had not operated our mine in 1934, and that we had no income or right to deduct depletion in 1934, we felt that the 1933 election was still effective, and we concluded that no further action on petitioner's 1934 return was required or was necessary.

Recross Examination.

At the time I prepared the original 1934 return for the petitioner I was familiar with and considered Section 114(b)(4) of the Revenue Act of 1934.

Direct Examination.

Mr. James Dean, having heretofore been first duly sworn, was recalled to the stand and testified as follows with reference to subdivision (J)(1), item 13 of Schedule L of peti-
137 tioner's original income tax return for 1934 (Exhibit 1 hereof) which is labelled "depletion $25,144.51":

When petitioner was organized it placed a value on its property of $15,000,000.00, but later the Bureau of Internal Revenue reduced that value to $7,000,000.00. The petitioner never changed the value which it had originally placed on its books. It continued to deduct dep' .on on the basis of the original value on its books, although on its tax returns it deducted depletion on the basis which the Government had allowed. Said item is the amount which petitioner deducts on its books on the basis of the original value given it in 1919 in its accounts. In other words, the
138 aforementioned item on petitioner's return is shown in a schedule of non-deductible items and that is the deduction for depletion on the cost basis of $15,000,000.00 which, if petitioner were following its book cost and not the Commissioner's income tax cost, petitioner would be entitled to deduct. That entry was also made on petitioner's books in 1933 and every year petitioner followed its own basis for deducting depletion on its books. In other years petitioner showed a similar non-deductible amount in its returns which was in reconciliation of surplus between book income and tax income. Such nondeductible amounts shown in petitioner's returns also included such items as income tax which is not deductible. The $25,144.51 item listed on peti-

tioner's 1934 return was not transferred or claimed as a deduction in petitioner's income tax return for that year because petitioner was not allowed to deduct it under the Treasury Department rulings because such item was based on a value in excess of the value the Treasury Department gave petitioner for depletion and petitioner's cost depletion as computed on the Bureau's basis had been exhausted in 1925.

Hearing concluded.

Approval of Statement of Evidence by Counsel for Petitioner on Review and by Counsel for Respondent on Review. 140

The foregoing, together with petitioner's Exhibits 1, 3, 4, 5, 6, 7, is all of the evidence material on appeal adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Paul E. Shorb, as attorney for the petitioner on review, and by the Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, as attorney for the respondent, Commissioner of Internal Revenue.

PAUL E. SHORB,
Attorney for Petitioner. 141

J. P. WENCHEL,
Chief Counsel
Bureau of Internal Revenue
Attorney for Respondent
Commissioner of Internal
Revenue

Approved and ordered filed this 12th day of July 1941.

(S) J. M. STERNHAGEN,
Member United States Board of Tax Appeals

Form 1120

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN
For Calendar Year 1934

or Fiscal Year beginning _____, 1934, and ended _____, 1935

(Print plainly corporation's name and business address)

MOWER LODE QUALITY GOLD MINES COMPANY

120 BROADWAY (Street)

NEW YORK, N.Y. (Post office and State)

It is Essential, Except Where Otherwise Provided in the Instructions, That This Form be Completely Filled In Irrespective of Any Statements, Schedules, or Reports Submitted Herewith

Date of Incorporation APRIL 17, 1919

Under the Laws of what State or Country DELAWARE

2652

2-New York

The Corporation's Books are in Care of JAMES GRAY, Treasurer Located at 120 BROADWAY, NEW YORK, N.Y.

Kind of Business (in detail) COPPER MINING (Also attach Industrial Division on page 2)

Is This a Consolidated Return of Affiliated Corporations? NO If so, of How Many Corporations?

If a Foreign Corporation, State Whether Resident or Nonresident; If Nonresident, State Amount of Income Included (Instructions 22) From Gross Income, $

Is the Corporation a personal holding company within the meaning of Section 351 of the Revenue Act of 1934? NO (Answer "yes" or "no") (If so, an additional return on Form 1120 H must be filed)

ATTACH REMITTANCE HERE

GROSS INCOME

1. Gross Sales (where inventories are an income-determining factor), $; Less Returns and Allowances, $; Net Sales					83	607	97	
2. Less Cost of Goods Sold:								
(a) Inventory at beginning of year		84	848	04				17
(b) Material or merchandise bought for manufacture or sale								
(c) Miscellaneous costs (From Schedule A, Column 2): (1) Salaries and wages, $; (2) Other costs, $; Total		6	979	19				59
(d) Total of Items (a), (b), and (c)		91	828	23				
(e) Less inventory at end of year		16	930	88	74	897	35	
3. Gross Profit from Sales (Item 1 minus Item 2)					57	690	62	3
4. Gross Receipts (where inventories are not an income-determining factor)								
5. Less cost of operations (From Schedule A, Column 3): (a) Salaries and wages, $; (b) Other costs, $; Total								
6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)								
7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.						42	86	6
8. Rents						102	00	
9. Royalties								
10. Capital Gain or Loss (From Schedule D)								
11. Interest on Liberty Bonds, etc. (From Schedule B)								
12. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1934								
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1934								
(c) Foreign Corporations								
13. Other Income (Give nature of Income) (Use separate schedule, if necessary)								
14. TOTAL INCOME (Items 3, and 6 to 13, inclusive)							37	865 12

DEDUCTIONS

15. Compensation of Officers (From Schedule C)								
16. Rent on Business Property								
17. Repairs (From Schedule D) (If Salaries and Wages, $; (If Reported Elsewhere, Explain) ; Total								
18. Interest								
19. Taxes (From Schedule E)						9	883	46
20. Losses by Fire, Storm, etc. (From Schedule F)								
21. Bad Debts (From Schedule G)								
22. Dividends (Item 12 as above)								
23. Depreciation (according to rules and rates prescribed by the Commissioner) (From Schedule I)								
24. Depletion of Mines, Oil and Gas Wells, Timber, etc. (Attach schedule, see Instructions 23)								
25. Other Deductions Authorized by Law (Explain below, or on separate sheet) N.Y. General Expense						10	000	00
Selling Commission						1	217	70
(a) Salaries and wages (Not included in Items 1, 2, 5, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, or 25)						1	884	87
(b) Bell Telephone Expense on Personal Property						41	900	00
26. TOTAL DEDUCTIONS (Items 15 to 25)							64	985 00
27. NET INCOME (Item 14 minus Item 26)							32	880 12

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PETITIONER'S EXHIBIT

COMPUTATION OF TAX

6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)

7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc. 48 86

8. Rents 192 00

9. Royalties

10. Capital Gain or Loss (From Schedule D)

11. Interest on Liberty Bonds, etc. (From Schedule J)

12. Dividends on Stock of:

(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1936

(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1936

(c) Foreign Corporations

13. Other Income (State nature of income) (Use separate schedule, if necessary)

14. TOTAL Income as (Items 3, plus 6 to 13, inclusive) 37 865 12

DEDUCTIONS

15. Compensation of Officers (From schedule C)

16. Rent on Business Property

17. Repairs (From Schedule D) (If claimed, explain below) Total

18. Interest

19. Taxes (From Schedule E) 7 891 44

20. Losses by Fire, Storm, etc. (From Schedule F)

21. Bad Debts (From Schedule G)

22. Dividends (Item 12 as above)

23. Depreciation (according from exhaustion, wear and tear, or obsolescence) (From Schedule I)

24. Depletion of Mines, Oil and Gas Wells, Timber, etc. (Attach schedule, see Instruction 10)

25. Other Deductions Authorized by Law (Explain below, or on separate sheet) E.T. General Expense 15 089 35
Selling Commission 1 217 75
1 884 88
Delivery Expense on Refined Copper 43 949 50

(a) Salaries and wages. (Also included in Items 2, 3, 4, and 15)

(b)

26. Total Deductions as (Items 15 to 25) 69 703 89

27. Net Income (Item 14 minus Item 26) 38 838 35

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PETITIONER'S EXHIBIT 1

COMPUTATION OF TAX

Income Tax		Excess-Profits Tax	
28. Net Income (Item 27, above)	38838	29. Net Income for Excess-profits Tax Computation (Item 27, above)	38838
29. Less Interest on Liberty Bonds, etc. (Item 11)		30. Less [illegible] of [illegible] value of capital stock as declared to [illegible] and reduced but not below [illegible]	
30. Balance subject to Income Tax (Item 28 minus Item 29)	38838	31. Amount Subject to Excess-profits Tax (Item 29 minus Item 30)	
31. Income Tax [illegible] (If this is a consolidated return of affiliated corporations)		32. Excess-profits Tax [illegible] of Item 31)	
32. Less Income Tax Paid at Source: (a) On bonds, etc. (Item 11)		Note—Separate computation of Excess-profits Tax must be made on this form for each member of an affiliated group of corporations making a consolidated Excess-Profits return.	
(b) Income Tax Paid by a Foreign Corporation on U.S. Possession Income			
33. Balance of Income Tax (Item 31 minus Items 32 (a) and (b))			

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

1. Net income from line 29, page 1 of this return			29	999	46	10. Charged off during year: (a) Donations, gratuities, and contributions				
2. Nontaxable income: (a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia, or United States possessions						(b) Income and profits taxes paid to the United States, and such taxes paid to the government of foreign countries if claimed as a credit in whole or in part in item 10, page 1 of the return			823	69
(b) Interest on obligations of the United States (except interest in excess of exemption as reported in Schedule J (1))						(c) Federal taxes paid on tax-free covenant bonds				
(c) [illegible] deductible under Section 23 (p) of the Revenue Act of 1936						(d) Special improvement taxes tending to increase the value of the property assessed				
(d) Proceeds of life insurance policies paid upon the death of officers insured						(e) Furniture and fixtures, additions, or betterments, treated as expenses on the books				
(e) Other items of nontaxable income (to be detailed): (1)						(f) Replacements and renewals				
(2)						(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary				
(3)						(h) Interest on indebtedness incurred or assumed to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation				
3. Income against reserve for bad debts, if item 21, page 1 of return is not an addition to a reserve						(i) Additions to reserves for bad debts which are not included in item 21, page 1 of return				
4. Income against reserves for contingencies, etc. (to be detailed): (a)			3	681	69	(j) Additions to reserves for contingencies, etc. (to be detailed): (1) Depletion			89	144 91
(b)						(2)				
(c)						(3)				
5. Total of Lines 1 to 4, inclusive			33	216	67	(k) Other nondeductible deductions (to be detailed): (1)				
6. Total from Line 14			28	969	08	(2)				
7. Net profit or loss for year, as shown by books, before adjustments are made thereto (Line 7 minus Line 6)			61	184	71	(3)				
8. Surplus and undivided profits as shown by balance sheet at beginning taxable year		2	906	743	08	11. Total of Line 10			89	968 08
9. Other credits to surplus (to be detailed): (a)						12. Distributions paid during the taxable year (state whether paid in cash, stock of the corporation, or other property): (a) Date paid ____ Character ____				
(b)						(b) Date paid ____ Character ____				
(c)						(c) Date paid ____ Character ____				
10. Total of Lines 7 to 9, inclusive		2	967	927	79	(d) Date paid ____ Character ____				
11. Total from Line 17						13. Other debits to surplus (to be detailed): (a)				
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)		2	967	927	79	(b)				
						(c)				
						14. Total of Lines 11 and 13				

NET INCOME (OR DEFICIT) REPORTED IN RETURN FOR CALENDAR [illegible] / FISCAL YEAR BEGINNING

1. Net income $ 2,999.99 for 0-0-0 $ ( )

METHOD OF INVENTORY

2. Check the block to indicate the principal factors on which the corporation's cash income predominates, [illegible] business and related industries, including selling, factory, tax forwarding, leasing and [illegible] products.

- [x] Mining and quarrying, including gas and oil wells, and products thereof
- [ ] Manufacturing
- [ ] Food and kindred products
- [ ] Bakery and confectionery products
- [ ] Canned products—fish, fruit, vegetables, preserves, jams, jellies, etc.
- [ ] Grain products—flour, meal, etc.
- [ ] Meat products—canned, fresh, dressed, packing
- [ ] Sugar—beet, cane, maple sugarcane, etc.
- [ ] Other food products—butter substitutes, oleomargarine, cheese, condensed milk, dairy products, ice cream, etc.
- [ ] Beverages, soft drinks, mineral waters
- [ ] Brewing and distilling—alcohol, liquors, beer, malt liquors, wines
- [ ] Tobacco products
- [ ] Textiles
- [ ] Cotton goods—piece goods, yarn, sewing, darning
- [ ] Woolen and worsted goods—piece goods, yarn, wool products, felts
- [ ] Silk and rayon goods—piece goods, thrown silk, yarn, fabrics, weaving
- [ ] Carpets, floor coverings, tapestries, linoleum
- [ ] Other textiles—cord, felt, fur, linen, artificial leather, [illegible] goods, etc.
- [ ] Clothing, apparel goods, factory goods, underwear, millinery, etc.
- [ ] Knit goods—sweaters, hosiery, etc.
- [ ] Leather boots, shoes, slippers, etc.
- [ ] Other leather products, saddlery, harness, trunks, [illegible], luggage
- [ ] Rubber tires and tubes
- [ ] Other rubber goods—boots, shoes, heels, soles, belting
- [ ] Glass, refractory and heavy products
- [ ] Cement and clinker mill products

MANUFACTURING—(Continued)

Metal products and processes

- [ ] Iron and steel—products of blast furnaces, rolling mills, foundries
- [ ] Locomotives and railroad equipment
- [ ] Motor vehicles, complete or parts
- [ ] Machinery, delivery, sent to producing food, leather, metal, paper, printing, chemicals, stone, clay, glass, textile and wood products
- [ ] Machinery—[illegible] and equipment
- [ ] Machinery—electrical and appliances
- [ ] Machinery—other, building, construction, pumps and mining machinery and pumps sold
- [ ] Household equipment—metal furniture, refrigerators, sewing machines, etc.
- [ ] Office equipment
- [ ] Metal building materials and equipment
- [ ] Hardware, tools, etc.
- [ ] Precious metal, products and processes
- [ ] Other metals, products and processes

Miscellaneous manufacturing

- [ ] Radios, complete or parts
- [ ] Musical, professional, and scientific instruments, optical goods, watches
- [ ] Airplanes, airships, engines, parts
- [ ] Transportation, conveyances, bridges, buildings, sections, shops, equipping and building systems
- [ ] Transportation—rail, water, aerial, motor, etc., leasing and facilities
- [ ] Public utilities—electric, light or power, gas (artificial or natural), coke, steam, refrigeration, water, sanitary or other, local supply and facilities, etc., leasing, [illegible] and sales
- [ ] Storage and storage, grain elevators, warehouses, cold storage rooms, etc.

Trade

- [ ] Wholesale
- [ ] Retail
- [ ] Wholesale and retail

AFFILIATIONS WITH OTHER CORPORATIONS (See Instruction 15)

3. Is this a consolidated return? No If so, prepare from the schedule of interest revenue for your display Form 851, Affiliations Schedule, which shall be filed in, annex to, and form a part of this return.

4. Was the business of this corporation included in a consolidated return for the preceding year? No

If so, give name of corporation which filed the consolidated return.

PREFERENCE DIVIDENDS

5. Did the corporation make the return under the same name for the preceding taxable year? Yes

Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No If answer is "yes", give name and address of such predecessor business, and the date of the change in entity.

If any such change was any asset value increased or decreased?

If the answer is "yes", during balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF REPORT

6. Is this return made on the basis of cash receipts and disbursements? No

If not, describe fully what other basis or method was used in computing net income.

Accruals and Reserves

VALUATION OF INVENTORIES

7. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used, and the date necessary was last reconciled with cost.

Cost or market whichever is lower

COMPENSATION OF OFFICERS (See Instruction 16)

8. Did any person or persons advise the corporation in regard to any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation? No If so, give the name and address of such person or persons and state the nature and extent of the services or advice rendered and the items and schedules in respect of which the assistance or advice was received. If this return was actually prepared by any person or persons other than the corporation, state the name of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons.

5. Total of Lines 1 to 4, inclusive			00	428 97
6. Total from Line 14			89	968 06
7. Net profit or loss for year, as shown by books, before taxes are made thereon (Line 5 minus Line 6)			61	104 71
8. Surplus and undivided profits as shown by balance sheet at beginning taxable year		2	906	763 03
9. Other credits to surplus (to be detailed): (a)				
(b)				
(c)				
10. Total of Lines 7 to 9, inclusive		2	967	927 74
11. Total from Line 17				
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)		2	967	927 74

13. (a)				
(b)				
14. Total of Lines 13			89	968 06
15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property): (a) Date paid, Character				
(b) Date paid, Character				
(c) Date paid, Character				
(d) Date paid, Character				
16. Other debits to surplus (to be detailed): (a)				
(b)				
(c)				
17. Total of Lines 15 and 16				

NET INCOME (OR DEFICIT) REPORTED IN RETURN FOR CALENDAR [illegible] FISCAL YEAR BEGINNING

1. Net income, $ 5,999.99 for 6 months; deficit, $ [illegible]

BASIS OF REPORTING

2. Check the block to indicate the principal division in which the corporation's trade income predominates:

Agriculture and related industries, including utilities, forestry, fur-harvesting, hunting and fishing.

☒ Mining and quarrying, including oil and gas wells and all products sold therefrom.

MANUFACTURING

Food and kindred products:
- ☐ Bakery and confectionery products.
- ☐ Canned products—fish, fruit, vegetables, preserves.
- ☐ Grain products—meal, flour, feed.
- ☐ Meat products—packing, sausage, rendering, etc.
- ☐ Milk products—butter, cheese, condensed, evaporated, powdered, ice cream.
- ☐ Sugar—beet, cane, maple, molasses, etc.
- ☐ Other food products—butter substitutes, oils, fats, edible spices, dairy products not elsewhere classified, etc.
- ☐ Beverages, soft drinks, mineral waters.
- ☐ Brewing and distilling—alcohol, liquors, malt, malt extract, vinegar.
- ☐ Tobacco products.

Textiles:
- ☐ Cotton goods—cotton goods, cloth, cotton small wares, clothing.
- ☐ Woollen and worsted goods—woollen goods, cloth, woollen small wares, clothing.
- ☐ Silk and rayon goods—silk goods, rayon goods, clothing, dressmaking.
- ☐ Carpets, floor coverings, tapestries, linoleums.
- ☐ Other textiles—cord, felt, fur, linen, artificial leather, fibreglass products, etc.
- ☐ Clothing, including men's, women's, children's, factory, custom, repair, etc.
- ☐ Knit goods—underwear, hosiery, etc.
- ☐ Leather goods—boots, shoes, slippers, etc.

- ☐ Other wood products—millwork, furniture, boxes, containers, flooring.
- ☐ Rubber tires and tubes.
- ☐ Other rubber goods—boots, shoes, heels, soles, mechanical rubber goods.
- ☐ Paper, pulp and paper products.
- ☐ Printing, publishing, and allied industries.
- ☐ Petroleum and other mineral oil refining and products.
- ☐ Chemicals—paints, acids, compounds, coal tar products, etc.
- ☐ Pharmaceutical preparations, drugs, pills, serums, etc.
- ☐ Paints, pigments, varnishes, etc.
- ☐ Fertilizers.
- ☐ Explosives, clays, glues, and related products.

MANUFACTURING—(Continued)

Metal products and processes:
- ☐ Iron and steel—products of blast furnaces, rolling mills, foundries.
- ☐ Locomotives and railroad equipment.
- ☐ Motor vehicles, complete or parts.
- ☐ Machinery—factory, used in producing food, leather, wood, paper, printing, rubber, stone, clay, glass, iron or steel products.
- ☐ Machinery—[illegible] and equipment.
- ☐ Machinery—electrical and equipment.
- ☐ Machinery—other, building, construction, pit and mining machinery and heavy steel.
- ☐ Household equipment—metal furniture, refrigerators, stoves, sewing machines, etc.
- ☐ Office equipment.
- ☐ Metal building material and equipment.
- ☐ Hardware, tools, etc.
- ☐ Precious metal, products and processes.
- ☐ Other metals, products and processes.

Miscellaneous manufacturing:
- ☐ Scales, complete or parts.
- ☐ Musical, professional, and scientific instruments, optical goods, watches and clocks.
- ☐ Linoleum, oilcloth, oilcloth goods.
- ☐ Construction—corporations, bridges, buildings, railroads, dams, excavating and tunnelling systems.
- ☐ Power—water, coal, water, petrol, motor, etc., developed main business.
- ☐ Public utilities—(do not include here or private, gas distribution of natural gas from holding companies, electric, water & gas, heat supply, toll bridges, etc., leasing such utilities).
- ☐ Storage—cold storage, grain elevators, warehouses, safe deposit vaults, etc.

Trade:
- ☐ Wholesale.
- ☐ Retail.
- ☐ Wholesale and retail.

Construction:
- ☐ All other trade—repair service, garages by dealers, filling stations, etc.
- ☐ Service—professional, business, amusements, domestic, and all other.

Finance:
- ☐ Banks—national, State, private, savings, public stock brokerage.
- ☐ Stock, grain & cotton exchanges, investment business of holding or investment assets.
- ☐ Real estate, realty holding, and estate agents.
- ☐ Insurance companies.
- ☐ Other finance—loan companies, holding and land companies, [illegible] and other finance, check appropriate [illegible]

AFFILIATIONS WITH OTHER CORPORATIONS (See Instruction 12)

3. Is this a consolidated return? No If so, prepare form the number of internal revenue for your district Form 851, Affiliations Schedule, which shall be filed in, sworn to, and filed as a part of this return.

4. Was the business of this corporation included in a consolidated return for the prior year? No If so, give name of corporation which filed the consolidated return.

PREDECESSOR BUSINESS

5. Did this or another like a return under the same name for the preceding taxable year? Yes Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or business or substance during this or any prior year since December 31, 1917? No If answer is "yes", give name and address of such predecessor business, and the date of the change in control.

If any such change were any asset values increased or decreased? If the answer is "yes", attach balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF REPORT

6. Is this return made on the basis of cash receipts and disbursements? No If not, describe fully what other basis or method was used in computing net income. Accruals and Reserves

VALUATION OF INVENTORIES

7. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date necessary was last consulted with check. Cost or market whichever is lower

PREPARATION OF RETURN (See Instruction 13)

8. Did any person or persons advise the corporation in regard to any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation? No If so, give the name and address of such person or persons and state the nature and extent of the assistance or advice rendered and the items and schedules in respect of which the assistance or advice was rendered, if this return was actually prepared by any person or persons other than the corporation, state the source of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons.

INFORMATION RETURN

9. Did the corporation make a return of labor matters on Forms 1087 and 1088 (see Instruction 27) for the calendar year 1920? No

LIST OF ATTACHED SCHEDULES

10. Enter below a list of all schedules accompanying this return. Number consecutively. The name and address of the corporation should be given on each supplemental schedule.

Page 2 of Return

Item	Beginning of Taxable Year				End of Taxable Year			
	Amount				Amount			
ASSETS								
1. Cash					$ 486	366	91	
2. Notes receivable								
3. Accounts receivable	$ 61	287	71		$ 11	188	06	
(a) Less reserve for bad debts					61	287	71	
4. Inventories:								
(a) Raw materials	$				$			
(b) Work in process								
(c) Finished goods Copper on Rail	20	348	06		10	938	88	
(d) Supplies		275	90			277	90	
					80	800	96	
5. Investments (securities):								
(a) Obligations of a State, Territory, or any political subdivision thereof, or District of Columbia, or United States possessions	$				$			
(b) Obligations of instrumentalities of the United States								
(c) Obligations of the United States					None			
6. Other investments:								
(a) Stocks of domestic corporations	$				$			
(b) Bonds of domestic corporations								
(c) Stocks and bonds of foreign corporations								
(d) All other investments or loans	88	776	88		84	906	88	
7. Deferred charges:								
(a) Prepaid insurance	$ 1	806	75		$			
(b) Prepaid taxes								
(c) All other					1	806	75	
8. Capital assets:								
(a) Land	$				$			
(b) Buildings & Equipment	644	903	14		644	903	14	
(c) Machinery and equipment								
(d) Furniture and fixtures								
(e) Delivery equipment								
Also Property	18	197	274	81	18	197	274	81
organization Expense		876	800	00		876	800	00
	$ 17	719	488	95	$ 17	719	487	95
(f) Less reserves for depreciation (except on land)	17	194	888	95	17	196	877	95
9. Patents								
10. Good will								
11. Other items (describe fully):	$				$			

6. Other investments:																		
(a) Stocks of domestic corporations	$									$								
(b) Bonds of domestic corporations																		
(c) Stocks and bonds of foreign corporations																		
(d) All other investments or loans			87	774	25			87	774	25			84	908	25			84 908 25
7. Deferred charges:																		
(a) Prepaid insurance	$		2	906	75						$							
(b) Prepaid taxes																		
(c) All other							1	906	75									Same
8. Capital assets:																		
(a) Land	$										$							
(b) Buildings & Equipment			644	908	14								644	908	14			
(c) Machinery and equipment																		
(d) Furniture and fixtures																		
(e) Delivery equipment																		
Mine Property		18	197	274	83							18	197	274	83			
Organization Expense			870	800	00								(870	800	00			
(f) Less reserves for depreciation (except on land)	$	17	710	487	00						$	17	710	487	00			
		17	194	888	00			888	888	00		17	194	877	00			888 888 00
9. Patents																		
10. Good will																		
11. Other assets (describe fully):																		
	$										$							
12. TOTAL ASSETS						$	1	102	469	22						$	1	171 888 00
LIABILITIES																		
13. Notes payable (less than one year)	$					$		4	227	94						$		39 828 75
14. Accounts payable																		
15. Bonds and notes (not secured by mortgage)																		
16. Mortgages (including bonds and notes so secured)																		
17. Accrued expenses:																		
(a) Interest	$										$							
(b) Taxes			7	275	00								7	275	00			
(c) All other			2	000	00			10	300	50				494	00			7 769 00
18. Other liabilities (describe fully):																		
	$										$							
19. Capital stock:																		
(a) Preferred stock (less stock in treasury)	$										$							
(b) Common stock (less stock in treasury)	$	091	868	81		4	091	868	81		4	091	868	81		4	091	868 81
20. Surplus	$																	
21. Undivided profits						2	906	743	03							2	967	927 74
22. TOTAL LIABILITIES						$	1	199	469	22						$	1	171 888 00

Remarks

5-1

Items	Amount
Salaries and wages	$
Other costs	

Items	Amount
Salaries and wages	$
Other costs	

SCHEDULE B—CAPITAL GAINS AND LOSSES (See Instruction 10)

1. Description of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Received	5. Cost	6. Market L. 1913, Value if Acquired Before That Date	7. Cost or Imputed Cost After Adjustments on March 1, 1913	8. Depreciation Allowed (or Allowable) Since Acquisition on March 1, 1913 (Formula Grantor)	9. Gain or Loss
			$	$	$	$	$	$

Net Gain or Loss (enter as Item 10) (Capital losses are allowable only to the extent of $2,000 plus capital gains) $

State (1) how property was acquired ; (2) whether at time of sale or exchange purchaser owned more than 10% in value of your outstanding stock

Every sale or exchange of stock should be reported in detail, including name and address of corporation, class of stock, number of shares, capital changes affecting book values, dividends, other assumable dividends, stock rights, etc.).

Cost of property must be entered in column 5 if a loss is claimed in column 9.

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 12)

1. Name and Address of Officer	2. Official Title	3. Time Devoted to Business	Salary of Stock Owners		5. Amount of Compensation (Enter on Item 14)
			4. Common	5. Preferred	
					$

Note: Schedule C-1 also must be filed with this return if compensation in excess of $15,000 was paid to any officer or employee.

SCHEDULE D—COST OF REPAIRS (See Instruction 17)

1. Items	2. Amount (Enter on Item 17)
Salaries and wages	$
Other costs	

SCHEDULE E—TAXES PAID (See Instruction 18)

1. Items	2. Amount (Enter on Item)
State of Delaware	$ 6,275 00
Capital Stock Tax	1,000 00
Territory of Alaska	15 00
Federal Check Tax	1 00
	$ 7,291 00

SCHEDULE F—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. (See Instruction 20)

1. Kind of Property	2. Date Acquired	3. Cost	4. Depreciation Subsequent to Acquisition	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Uncompensated Loss (Enter on Item 22)
		$	$	$	$	$

State how property was acquired

SCHEDULE G—BAD DEBTS (See Instruction 21)

1. Year	2. Amount of Accounts	3. Bad Debts
1950	$	$
1951		
1952		
1953		
1954		

SCHEDULE H—INCOME FROM DIVIDENDS (See Instruction 13)

Include below all dividends received during the year, stating the amount and the name and address of the corporation which declared the dividend.

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 22)

1. Items	2. Amount (Enter on line 30)	1. Items	2. Amount (Enter on line 30)
Salaries and wages		State of Delaware	6,275 00
Other costs		Capital Stock Tax	1,000 00
		Territory of Alaska	10 00
		Federal Credit Tax	1 00
			7,291 00

SCHEDULE F—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORMS, ETC. (See Instruction 20)

1. Date or Purpose	2. Basis Adjusted	3. Cost	4. Depreciation (Instruction)	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss (Enter on line 31)

State how property was acquired

SCHEDULE G—BAD DEBTS (See Instruction 21)

1. Year	2. Amount Charged Off	3. Bad Debts Recovered
1933		
1934		
1935		
1936		
1937		

SCHEDULE H—INCOME FROM DIVIDENDS (See Instruction 12)

Include below all dividends received during the year, stating the amount and the name and address of the corporation which declared the dividend.

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 22)

1. Kind of Property (If Real Estate, Give Location)	2. Date Acquired	3. Cost or Value as of March 1, 1913 (Basis of Depreciation Prior to Last Sale or Exchange) (Enter on line 1)	4. Amount Prior Depreciation to the Beginning of the Year	5. Depreciation Allowed (or Allowable) in Prior Years	6. Balance Cost or Other Basis to Be Recovered	7. Life Used in Allowable Depreciation	8. Estimated Remaining Life from Beginning of Year	9. Depreciation Allowable This Year

SCHEDULE J—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 11)

1. Obligations or Securities	2. Amount Owned	3. Interest Received or Accrued	4. Par Value Exempt from Taxation	5. Amount Owned at Close of Year	6. Interest on Amount at Close of Year (Enter on line 14)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions			All		
(b) Liberty bonds under Federal Reserve Act, 4¼% bonds and 4% bonds issued under Section 1, Second Liberty Bond Act, as amended			All		
(c) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All		
(d) Liberty 3½% bonds, Bonds and Treasury Bonds			All		
(e) Obligations of instrumentalities of the United States other than obligations to be entered in item (a) above			None		

AFFIDAVIT (See Instruction 30)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including the accompanying schedules and statements, if any) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Revenue Act of 1936 and the Regulations issued thereunder.

Sworn to and subscribed before me this 12th day of March, 1937

(Signature of officer administering oath) (Title)

(Signature of president or other principal officer)

(Signature, designation, and address of chief accounting officer)

AFFIDAVIT (See Instruction 31)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that this return (including the accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Sworn to and subscribed before me this ..... day of ....., 193

(Signature of person preparing the return)

(Signature of person preparing the return)

(Signature of officer administering oath) (Title)

(Number of firm or employer, if any) (Address)

For Calendar Year 1936

April 17, 1919

Under the Laws of what State or Country Delaware

GROSS INCOME

1. Gross Sales (where inventories are an income-determining factor), $; Less Returns and Allowances, $; Net Sales, $ 211 100 98

2. Less Cost of Goods Sold:
(a) Inventory at beginning of year $ 10 916 22
(b) Material or merchandise bought for manufacture or sale
(c) Miscellaneous costs (Form 1065, Schedule A, Column D): (1) Salaries and wages, $; (2) Other costs, $; Total 228 183 54
(d) Total of Items (a), (b), and (c) $ 239 100 76
(e) Less inventory at end of year 178 069 98 161 030 78

3. Gross Profit from Sales (Item 1 minus Item 2) $ 150 070 20

4. Gross Receipts (where inventories are not an income-determining factor)

5. Less cost of operations (Form 1065, Schedule A, Column D): (a) Salaries and wages, $; (b) Other costs, $; Total

6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)

7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.

8. Rents

10. Capital Gain or Loss (Form 1065, Schedule D)

11. Interest on Liberty Bonds, etc. (Form 1065, Schedule A, Lines 9 (a) (2) and (3))

12. Dividends on Stock of:
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1936
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1936
(c) Foreign Corporations

13. Other Income (Give nature of income) (Use separate schedule, if necessary) Salvage of Old Material 18 66

14. Total Income as Items 3, and 6 to 13, inclusive $ 150 088 86

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GROSS INCOME

1. Gross Sales (where inventories are an income-determining factor), $	Less Returns and Allowances, $	Net Sales, $			211	389	00
2. Less Cost of Goods Sold: (a) Inventory at beginning of year			38	886	84		
(b) Material or merchandise bought for manufacture or sale							
(c) Miscellaneous costs (from Schedule A, Column 2): (1) Salaries and wages, $; (2) Other costs, $; Total			888	188	84		
(d) Total of Items (a), (b), and (c)			888	188	84		
(e) Less inventory at end of year			178	888	88	165	888
3. Gross Profit from Sales (Item 1 minus Item 2)						188	888
4. Gross Receipts (where inventories are not an income-determining factor)							
5. Less cost of operations (from Schedule A, Column 2): (a) Salaries and wages, $; (b) Other costs, $; Total							
6. Gross P[illegible] (where inventories are not an income-determining factor) (from 4 minus Item 5)							
7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.							
8. Rents						188	88
9. [illegible]							
10. Capital Gain or Loss (from Schedule D)							
11. Interest on Liberty Bonds, etc. (from Schedule A, Items 8 (a) (b) and (c))							
12. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1936							
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1936							
(c) Foreign Corporations							
13. Other Income (from sales of assets) (for separate schedule, if necessary) Salvage of Old Material						18	88
14. Total Income as Items 3, and 6 to 13, inclusive							

DEDUCTIONS

15. Compensation of Officers (from Schedule C)							
16. Rent on Business Property							
17. Repairs (from Schedule A) as to Salaries and Wages, $; (b) Other Costs, $; Total						88	888
18. Interest							
19. Taxes (from Schedule B)						8	888
20. Losses by Fire, Storm, etc. (from Schedule F)							
21. Bad Debts (from Schedule A) (for other bonds determined to be worthless during taxable year (Taxpayers on reserve basis only))							
22. Dividends (Item 12 (a) above)							
23. Depreciation (Sterling from exhaustion, wear and tear, or obsolescence) (from Schedule D)							
24. Depletion of Mines, Oil and Gas Wells, Timber, etc. (Attach schedule, as instructed on Schedule D, 7						88	888
25. Other Deductions Authorized by Law (Explain below, or on separate sheet) Shut-down Expenses						8	888
(a) Advertising expenses (Attach schedule showing nature and amount) New York Journal Expenses						12	888
(b) Charitable contributions (Attach schedule showing name of donee and amount) Selling Commission						8	888
(c) Delivery Expense on Refined Copper						7	888
26. Total Deductions as Items 15 to 25						88	888
27. Net Income (Item 14 minus Item 26)						88	888

COMPUTATION OF TAX

Income Tax								
28. Net Income (Item 27, above)				88	888	88	28. Net Income (Item 27, above)	88 888 88
29. Less Interest on Liberty Bonds, etc. (Item 27)					None		29. Less [illegible]	188 188 88
30. Balance subject to Income Tax (Item 28 minus Item 29)				88	888	88	30. Amount subject to Excess Profits Tax	
31. Income Tax [illegible] (Item 30 at [illegible] of Item 30, if [illegible])				8	888	88	31. Excess Profits Tax [illegible] of Item 30	None
32. Less Income Tax Paid at Source: (a) [illegible]								
(b) [illegible]								
33. Income Tax Paid by Collector (Item 31 minus Item 32)								

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SCHEDULE L—reconciliation of net income and analysis of reserves or surplus

1. Net income per books (Item 31, page 1 of return)			88	665	36	6. Deductions not charged against book income:			
2. Reasonable reserves:						(a) Donations, gifts, etc. not deductible			
(a) Reserve on:						(b) Taxes and public taxes paid to the United States, and such taxes paid to its possessions or foreign countries if claimed as a credit in whole or in part in Item 32, page 1 of the return		0	705	00
(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions						(c) United States taxes on income accrued this year			
(2) Obligations issued under Federal Farm Loan Act, or under such Act as amended						(d) Special improvement items (relating to increase the value of the property assessed			
(3) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917						(e) Premiums and interest, rebates, or interest treated as expenses on the books			
(4) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness						(f) Depreciation and accruals			
(5) Liberty 4% and 4½% Bonds, United States Savings Bonds, and Treasury Bonds owned in the principal amount of $4,000 and under						(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary			
(6) Liberty 4% and 4½% Bonds, United States Savings Bonds, and Treasury Bonds owned in the principal amount of over $4,000						(h) Interest on indebtedness incurred or continued to purchase or carry obligations (other than obligations of the United States issued after September 24, 1917, and subjectly exempt for by the taxpayer) the income upon which is wholly exempt from taxation			
(7) Obligations of instrumentalities of the United States (other than those to be reported in Lines 2 (a) (3) above)						(i) Additions to reserve for bad debts which are not included in Item 31, page 1 of return			
(b) Dividends deductible under Section 26 (p) of the Revenue Act of 1936						(j) Additions to reserves for contingencies, etc. (to be detailed):			
(c) Proceeds of life insurance policies paid upon the death of the insured						(1)			
(d) Other items of nontaxable income (to be detailed):						(2)			
(1)						(3)			
(2)						(k) Other unallowable deductions (to be detailed):			
3. Charges against reserves for bad debts, if Item 31, page 1 of return, is not an addition to a reserve						(a) Depletion		88	960	70
4. Charges against reserves for contingencies, etc. (to be detailed):						(2)			
(a) Accrued Federal Income Taxes			44	489	97	(3)			
(b)						7. Total of Lines 6		44	897	86
(c)						8. Total of Lines 1 to 4, inclusive		107	963	57
5. Total of Lines 1 to 4, inclusive			107	963	57	9. Total from Line 31		64	307	86
6. Total from Line 31			64	307	86	10. Net profit or loss for year, as shown by books, before any adjustments are made thereto (Line 5 minus Line 9) (If loss, indicate)		43	362	21
7. Net profit or loss for year, as shown by books, before any adjustments are made thereto (Line 5 minus Line 6) (If loss, indicate)			43	362	21	11. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year	2	967	927	74
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year	2		967	927	74	12. Other credits to surplus (to be detailed):				
9. Other credits to surplus (to be detailed):						(a)				
(a)						(b)				
(b)						13. Total of Lines 7 to 9, inclusive	2	924	865	53
10. Total of Lines 7 to 9, inclusive	2		924	865	53	14. Total from Line 17				
11. Total from Line 17						15. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 13 minus Line 14)	2	924	865	53

NATURE OF BUSINESS

1. Check the block to indicate the industrial division in which the corporation's main business (producing business) falls:

MANUFACTURING

Food and kindred products:

- ☐ Canned products—fish, fruit, vegetables, etc.
- ☐ Mill products—bran, flour, feed.
- ☐ Packing-house products—meats, lard, sausage casings.
- ☐ Sugar—beet, cane, maple; molasses, etc.
- ☐ Other food products—butter substitutes, oil nuts, cakes, spices, dairy products, fish, etc.
- ☐ Beverages, soft drinks, mineral water.
- ☐ Brewing and distilling—alcohol, liquors, beer, malt extract, wines.
- ☐ Tobacco products.
- ☐ _____

MANUFACTURING—(Continued)

Metal products and processes—(Cutlery, hardware, tools, implements, utensils, machines, engines, boilers, radiators, stoves, sheet, plate, bolts, nuts, screws, wire, jewelry and metal products):

- ☐ Machinery—agricultural and equipment.
- ☐ Machinery—electrical and equipment.
- ☐ Machinery—other, including construction, gas and mining machinery and equipment.
- ☐ Household equipment—metal furniture, refrigerators, stoves, washing machines, etc.
- ☐ Office equipment.
- ☐ Metal building material and equipment.
- ☐ Hardware, tools, etc.
- ☐ Precious metal, products and processes.

AFFILIATIONS WITH OTHER CORPORATIONS (See Instructions)

2. Is this a consolidated return? No If so, answer from the affiliation schedule of Internal Revenue for your District Form 851, Affiliations Schedule, which shall be filed in duplicate, executed, and filed as part of this return.

3. Was the income of this corporation included in a consolidated return for the prior year? No

If so, give name of corporation with which filed the consolidated return. _____

PERSONNEL DATA

4. Did the corporation file a return under the same name for the preceding taxable year? Yes

Was the corporation in any way an acquired, merged, consolidation, or reorganization of a business or business in existence during this or any prior year since December 31, 1917? No If answer is "yes", give name and address of such predecessor business, and the date of the change in ownership.

_____

_____

_____

5 Total of Lines 1 to 4, inclusive		107	948	87
6 Total from Line 17		64	597	96
7 Net profit or loss for year, as shown by books, before any adjustments are made thereto (Line 5 minus Line 6) or loss, indicate		43	352	91
8 Surplus and undivided profits as shown by balance sheet at close of preceding taxable year	2	967	927	74
9 Other credits to surplus (to be detailed): (a)				
(b)				
10 Total of Lines 7 to 9, inclusive	2	924	880	53
11 Total from Line 17				
12 Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)	2	524	860	53

13 Total of Line 6		64	597	96
14 Dividends paid during the taxable year (Give whether paid in cash, stock of this corporation, or other property): (a) Date paid ____ Amount				
(b) Date paid ____ Amount				
(c) Date paid ____ Amount				
(d) Date paid ____ Amount				
15 Other debits to surplus (to be detailed): (a)				
(b)				
(c)				
16 Total of Lines 13 and 15				

NATURE OF BUSINESS

1. Check the block to indicate the industrial division by which the corporation's main income-producing business falls:

MANUFACTURING

Food and kindred products:
- ☐ Canned products—fish, fruit, vegetables, etc.
- ☐ Mill products—flour, flour, feed,
- ☐ Packing-house products—meats, lard, sausage, tallow
- ☐ Sugar—beet, cane, maple, molasses, etc.
- ☐ Other food products—butter, confectionery, ice cream, coffee, spices, dairy products, fish, etc.
- ☐ Beverages, soft drinks, mineral waters
- ☐ Brewing and distilling—alcohol, liquors, beer, malt extract, wines
- ☐ Tobacco products

Textiles:
- ☐ Yarn, goods—cloth goods, etc.; supplies, dyeing
- ☐ Woolen and worsted goods—cloth goods, etc.; wool pulling, weaving
- ☐ Silk, and rayon goods—cloth goods, sewing silk, silk dyeing, weaving
- ☐ Carpets, floor coverings, tapestries, linoleum
- ☐ Other textiles—cord, felt, fur, linen, artificial leather, oilcloth, canvas, etc.
- ☐ Clothing, except goods, factory—cloth, underwear, hosiery, etc.
- ☐ Knit goods—underwear, hosiery, etc.
- ☐ Leather belts, shoes, slippers, etc.
- ☐ Other leather products—saddlery, harness, trunks, handbags, dressing
- Rubber tires and tubes
- ☐ Other rubber goods—boots, shoes, hose, soft rubber goods
- ☐ Wood, cellulose and ivory products
- ☐ Sawmill and planing mill products
- ☐ Furniture (not metal)
- ☐ Other wood products—carriages, wagons, baskets, etc.
- ☐ Paper, pulp and products
- ☐ Printing, publishing, and allied industries
- ☐ Petroleum and other mineral oil refining and products
- ☐ Chemicals proper, acid, compounds, and not products, etc.
- ☐ Allied chemical and dyestuffs—paints, drugs, oils, soaps, etc.
- ☐ Fertilizers, phosphates, superphosphates, etc.
- ☐ Petroleum
- ☐ Stone, clay, glass, and mineral products

Metal products and processes:
- ☐ Iron and steel—products of blast furnaces, rolling mills, foundries
- ☐ Agricultural and railroad equipment
- ☐ Motor vehicles, complete or parts
- ☐ Aeronautical equipment, complete or parts

MANUFACTURING—(Continued)

Metal products and processes—(Continued):
- ☐ Machinery—agricultural and equipment
- ☐ Machinery—electrical and equipment
- ☐ Machinery—other, building, construction, general and mining machinery and equipment
- ☐ Household equipment, except kitchen, refrigerators, sewing machines, etc.
- ☐ Office equipment
- ☐ Metal building material and equipment
- ☐ Hardware, tools, etc.
- ☐ Precious metal, products and processes
- ☐ Other metals, products and processes

Miscellaneous manufacturing:
- ☐ Rubber, complete or parts
- ☐ Musical, professional, and scientific instruments, optical goods, watches
- ☐ Explosives, ammunition, explosives, parts

NONMANUFACTURING

Trade:
- ☐ Wholesale
- ☐ Retail
- ☐ Wholesale and retail
- ☐ Commission
- ☐ Other trade—export traders, garages, etc.

Finance:
- ☐ Banks—national, State, private, savings, joint stock land banks
- ☐ Stock and bond brokers, investment bankers or dealers
- ☐ Real estate, realty holding, and mortgage agents
- ☐ Insurance companies (not agents)
- ☐ Investment trusts, stock syndicates, stock holding companies
- ☐ Other finance—loan companies, building and loan associations, credit, mortgage or pawn brokers, factoring agencies
- ☐ Agriculture and related industries, including farming, fishing, lumbering, hunting and trapping
- ☐ Mining and quarrying, including oil and gas wells, metal and nonmetal
- ☐ Contractors—construction, builders, building sub-trade, repairing and building services
- ☐ Transportation—railroad, water, motor, truck, bus, and airlines
- ☐ Transportation—pipe lines, express, warehousing, etc.
- ☐ Public utilities—electric light or power, gas (produced or purchased), gas lines, waterworks, telephone, telegraph, radio broadcasting, local transit, bus lines, etc., holding each utilities
- ☐ Service—professional, business, amusement, hotels, and all other

APPLICATIONS WITH OTHER CORPORATIONS (See Instruction 4)

4. Is this a consolidated return? No If so, present with the return of the parent corporation for such period Form 851, Affiliations Schedule, which shall be filed by, and form a part of this return.

5. Was the income of this corporation included in a consolidated return for the prior year? No

If so, give name of corporation which filed the consolidated return.

PERSONNEL DURING

6. Did the corporation file a return under the same name for the preceding taxable year? Yes

Was the corporation in any way an organized, result, combination, or reorganization of a business or business in existence during this or any prior year since December 31, 1917? No If answer is "yes", give name and address of such predecessor business, and the date of the change in entity.

If any such change were any asset values increased or decreased?

If the answer is "yes", attach balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN

8. Is this return made on the basis of cash receipts and disbursements? No

If not, describe fully what other basis or method was used in computing net income.

Accruals and Reserves

VALUATION OF INVENTORIES

9. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state the method and the date inventory was last recomputed with them.

Cost or market whichever is lower

PREPARATION OF RETURN (See Instruction 10)

If this any person or persons advise the corporation in regard to any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation? No

If so, give the name and address of such person or persons and state the nature and extent of the assistance or advice rendered and the items and schedules in respect of which the assistance or advice was rendered. If this return was actually prepared by any person or persons other than the corporation, state the name of the individual employed in this return and the manner to which it was furnished have disclosed by such person or persons.

DISCRIMINATION REFUND

If, Did the corporation make a return of information on Forms 959 and 10 [illegible] for the calendar year 1937

LIST OF ATTACHED SCHEDULES

If. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

Schedule J - Depletion

8

54

[redacted] - [redacted]

AFFIDAVIT

[redacted], Treasurer of the Mother Lode Coalition Mines Company, deposes as follows:

1. The taxpayer, Mother Lode Coalition Mines Company, is the owner of copper properties located in the McCarthy Mining Recording District at Kennecott, Alaska.

2. The taxpayer is the owner in fee of the copper properties.

3. The mining properties were acquired by the taxpayer on May 1, 1919.

4. Under the provisions of Section 114 (b)(4)of the Revenue Act of 1932 the taxpayer elected to deduct depletion on the percentage basis for the year 1933 and thereafter.

Depletion on percentage basis for the year 1935 is calculated as follows:

Gross sales of product of Mine		$331,100.98
Less:		
Freight to Smelter	$ 67,130.59	
Smelting & Refining	52,134.77	
Marine Insurance	742.77	
Delivery Expense on Copper	7,775.82	
Selling Expense on Copper	2,374.19	
Administration Expense	12,40 .25	
Mine Taxes	15.00	
	$142,599.41	142,599.41
Gross Income from Property		$188,501.57
Percentage Depletion being 15% of above Gross Income from Property		28,275.24
Net Income of Taxpayer (before depletion)		88,761.88
Percentage Depletion allowable		15,276.48

New York
New York

[redacted]
Treasurer.

Sworn to and subscribed before me this 13th day of March, 1936.

[redacted]

Item	Amount				Total				Amount				Total			
ASSETS																
1. Cash:																
(a) Demand deposits, including checks	$	884	882	02					$	323	489	19				
(b) Time deposits, including certificates of deposit																
(c) All other cash					$	884	882	02					$	323	489	19
2. Notes receivable																
3. Accounts receivable	$	11	123	86					$	361	480	91				
(a) Less reserve for bad debts						11	123	86						361	480	91
4. Inventories:																
(a) Raw materials: Grain	$								$	10	358	04				
(b) Work in process																
(c) Finished goods: Copper on Hand		10	918	22						149	573	22				
(d) Supplies			277	90							605	40				
						11	894	12						166	587	46
5. Investments (marketable):																
(a) Obligations of U. S. Government, or political subdivision thereof, or the District of Columbia, or United States possessions	$								$							
(b) Obligations issued under Federal Farm Loan Act, or other such Act as amended																
(c) Liberty Bonds and other obligations of United States issued on or after September 1, 1917																
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness																
(e) Liberty 4¼ and 4½ Bonds, United States Savings Bonds, and Treasury Bonds																
(f) Obligations of instrumentalities of the United States (other than obligations included in item 6)							None								None	
6. Other investments:																
(a) Stocks of domestic corporations	$								$							
(b) Bonds of domestic corporations																
(c) Stocks and bonds of foreign corporations																
(d) All other investments or loans		84	905	39		24	905	39							None	
7. Deferred charges:																
(a) Prepaid insurance	$								$							
(b) Prepaid taxes																
(c) All other							None			93	462	37		93	462	37
8. Capital assets:																
(a) Buildings, & Equipment	$	644	903	14					$	644	903	14				
(b) Machinery and equipment																
(c) Furniture and fixtures																
(d) Delivery equipment																
(e) Other depreciable assets																
(f) Total of Items (a) to (e)	$	644	903	14					$	644	903	14				
(g) Less reserves for depreciation		644	903	14			None			644	903	14			None	
(h) Depletable assets	317	073	588	86					317	073	583	86				
(i) Less reserves for depletion	16	310	176	45		858	402	41	16	596	312	11		477	271	75
(j) Land																
9. Patents																
10. Good will																
11. Other assets (describe fully):	$								$							

6. Other investments:																
(a) Stocks of domestic corporations	$								$							
(b) Bonds of domestic corporations																
(c) Stocks and bonds of foreign corporations																
(d) All other investments or loans		34	906	39		24	906	39								None
7. Deferred charges:																
(a) Prepaid insurance	$								$							
(b) Prepaid taxes																
(c) All other							None			93	462	37		93	462	37
8. Capital assets:																
(a) Buildings & Equipment	$	644	903	14					$	644	903	14				
(b) Machinery and equipment																
(c) Furniture and fixtures																
(d) Delivery equipment																
(e) Other depreciable assets																
(f) Total of Items (a) to (e)	$	644	903	14					$	644	903	14				
(g) Less reserves for depreciation		644	903	14			None			644	903	14			None	
(h) Depletable assets	317	073	583	86					317	073	583	86				
(i) Less reserves for depletion	16	596	312	11		558	402	43	16	596	312	11		477	871	75
(j) Land																
9. Patents																
10. Good will																
11. Other assets (describe fully):																
	$								$							
12. Total Assets					$	1	171	225	80				$	1	422	256	68
LIABILITIES																
13. Notes payable (less than 1 year)					$								$			
14. Accounts payable						39	815	73						39	704	03
15. Bonds and notes (not secured by mortgage)																
16. Mortgages (including bonds and notes so secured)																
17. Accrued expenses:																
(a) Interest	$															
(b) Taxes			7	275	00					18	067	69				
(c) All other				494	00		7	769	00		701	291	70		219	359	39
18. Other liabilities (describe fully):																
	$								$							
19. Capital stock:																
(a) Preferred stock (less stock in treasury)	$								$							
(b) Common stock (less stock in treasury)	4	091	568	81	4	091	568	81	4	091	568	81	4	091	568	81
20. Surplus	$								$							
21. Undivided profits	2	967	527	74	2	967	527	74	2	984	865	53		24	865	53
22. Total Liabilities					$	1	171	225	80				$	1	422	256	68

Remarks: _____

Page 4 of Partners

SCHEDULE A (See Instructions 5 and 6)

Items	Amount (Enter on Line 5 (a))	Items	Amount (Enter on Line 6)
Inventory at beginning of year		Salaries and wages	
Merchandise bought for manufacture or sale		Other costs	
Salaries and wages			
Other costs			
Materials & Supplies			
Inventory at end of year			

SCHEDULE B—CAPITAL GAINS AND LOSSES (FROM SALES OR EXCHANGES ONLY) (See Instructions 10)

1. Description of Property	2. Date Acquired (Mo., Day, Yr.)	3. Date Sold (Mo., Day, Yr.)	4. Gross Sales Price (Contract price)	5. Cost	6. Market value, if any, of property acquired before March 1, 1913	7. Cost or Interest-Added Adjustments on March 1, 1913	8. Depreciation Allowed (or Allowable) since March 1, 1913 (Fraction Omitted)	9. Gain or Loss

Gains or Loss (enter net amount on Item 10) (capital losses are allowable only to the extent of $2,000 plus capital gains)

State (1) how property was acquired ; (2) whether at time of sale or exchange purchaser owned more than 50% in value of your outstanding stock

Brief sale or exchange of stock should be reported in detail, including name and address of corporation, class of stock, number of shares, capital changes affecting book interest dividends, other nontaxable dividends, stock rights, etc.).

Cost of property must be entered in column 5 if a loss is claimed in column 9.

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 12)

1. Name and Address of Officer	2. Office, Title	3. Time Devoted to Business	Salary or Drawing Allowed		5. Amount of Compensation (Enter on Line 12)
			4. Ordinary	5. Preferred	

Note: Schedule C-1 IN DUPLICATE also must be filed with this return if compensation in excess of $15,000 was paid to any officer or employee.

SCHEDULE D—COST OF REPAIRS (See Instruction 17)

1. Items	2. Amount (Enter on Line 20)
Salaries and wages	
Other costs	

SCHEDULE E—TAXES PAID (See Instruction 18)

1. Items	2. Amount (Enter on Line 21)
State of Delaware Tax	
Franchise Tax	
Capital Stock	
Miscellaneous	

SCHEDULE F—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. (See Instruction 20)

1. Kind of Property	2. Date Acquired	3. Cost	4. Depreciation Sustained	5. Depreciation Allowed (or Allowable)	6. Insurance Collected	7. Deduction, if any (Enter on Line 22)

State how property was acquired

SCHEDULE G—BAD DEBTS (See Instruction 21)

1. Year	2. Net Income	3. Debts on Account	4. Bad Debts
1931			
1932			
1933			
1934			
1935			

SCHEDULE H—INCOME FROM DIVIDENDS (See Instruction 22)

Enumerate items of dividends received during the year, stating the amounts and the name and address of the corporation which declared the dividends

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 23)

1. Kind or Character of Property (If Group of Assets Submitted, Describe Each)	2. Date Acquired	3. Cost or Value at Beginning of Year (If Cost Not Known, Explain Basis)	4. Amount Prior Depreciation at Beg. of Year	5. Depreciation Allowed in Prior Years	6. Depreciation Cost of Assets Sold or Exchanged	7. Less Cost of Assets Sold, Exchanged or Destroyed	8. Depreciation Allowable Less Assets Sold or Exchanged	9. Depreciation Allowed This Year

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 14)

1. Name and Address of Officer	2. Common Stock	3. Time Devoted to Business	Shares of Stock Owned		5. Amount of Compensation (Enter on Page 1)
			4. Common	5. Preferred	
					$

Note: Schedule C-1 IN DUPLICATE also must be filed with this return if compensation in excess of $15,000 was paid to any officer or employee.

SCHEDULE D—COST OF REPAIRS (See Instruction 17)

1. Items	2. Amount (Enter on Page 1)
Salaries and wages	$
Other costs	

SCHEDULE E—TAXES PAID (See Instruction 18)

1. Items	2. Amount (Enter on Page 1)
State of Delaware Tax	$ [illegible]
Territory of Alaska	[illegible]
Capital Stock	1,50[illegible]
Miscellaneous	[illegible]
	2,50[illegible]

SCHEDULE F—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. (See Instruction 20)

1. Kind of Property	2. Date Acquired	3. Cost	4. Depreciation Sustained	5. Depreciation Allowed Since Acquired	6. Amount of Loss	7. Deduction (Enter on Page 1)
		$	$	$	$	$

Main line property was acquired _____

SCHEDULE G—BAD DEBTS (See Instruction 21)

1. Year	2. Net Income	3. Bonds or Accounts	4. Bad Debts
1931	$	$	$
1932			
1933			
1934			
1935			

SCHEDULE H—INCOME FROM DIVIDENDS (See Instruction 22)

Enter here all dividends received during the year, stating the amount and the name and address of the corporation which declared the dividend.

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 23)

1. Kind of Property (If Property of Less Than One Year's Standing, Give Date Acquired)	2. Date Acquired	3. Cost or Market Value as of March 1, 1913 (Enter Only One Item)	4. Amount Prior Depreciation as of Date or Year	5. Depreciation Allowed in Prior Years	6. Depreciation Cost of Property Sold or Its Equivalent	7. Loss Over Depreciation Allowed (Enter on Page 1)	8. Depreciation Allowed (Enter on Page 1)	9. Depreciation Allowed This Year
		$	$	$	$			$

AFFIDAVIT (See Instruction 40)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including the accompanying schedules and statements, if any) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Revenue Act of 1936 and the Regulations issued thereunder.

Sworn to and subscribed before me this 15th day of March, 1937.

[illegible]
(Signature of officer administering oath)

[illegible]
(Signature of president or other principal officer (Here sign))

[illegible]
(Signature, Assistant Treasurer, or Chief Accounting Officer—as the case may be)

OFFICIAL SEAL

CORPORATE SEAL

AFFIDAVIT (See Instruction 41)

I (or we) (or officer) that I (or we) prepared this return for the person named herein and that the return (including its accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I (or we) have any knowledge.

Sworn to and subscribed before me this _____ day of _____, 193[illegible]

_____
(Signature of person preparing the return)

_____
(Signature of person preparing the return)

_____
(Name of firm or employer, if any) (Address)

OFFICIAL SEAL

_____
(Signature of officer administering oath)

_____
(Title)

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5

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN
For Calendar Year 1933

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1934

Page 1 of Return

1017

DEPOSITORY RECEIPT
DEPOSIT OF INTERNAL REVENUE
Mch 16 1934
COLLECTOR 1ST DIV. REV.
2nd DIST. N.Y.

Name: Bohner Lode Coalition Mines Company

Street: 120 Broadway

Town and number: New York, N.Y.

Post office and State:

If a Successful (Except Where Otherwise Provided in the Instructions, This Box Is to Be Completely Filled in Irrespective of Any Statements, Schedules, or Exhibits Submitted Herewith

Date of Incorporation: April 17, 1919

Under the Laws of What State or Country: Delaware

The Corporation Books are in Care of: James Dunn, Treasurer — Location: 120 Broadway, New York, N. Y.

Kind of Business: Copper Mining — Is This a Consolidated Return? No — If so, of How Many Corporations?

If a Foreign Corporation, State Whether Qualified or Nonqualified — If Nonresident, State Amount of Income Included Hereunder as From Sources Within U.S.

GROSS INCOME

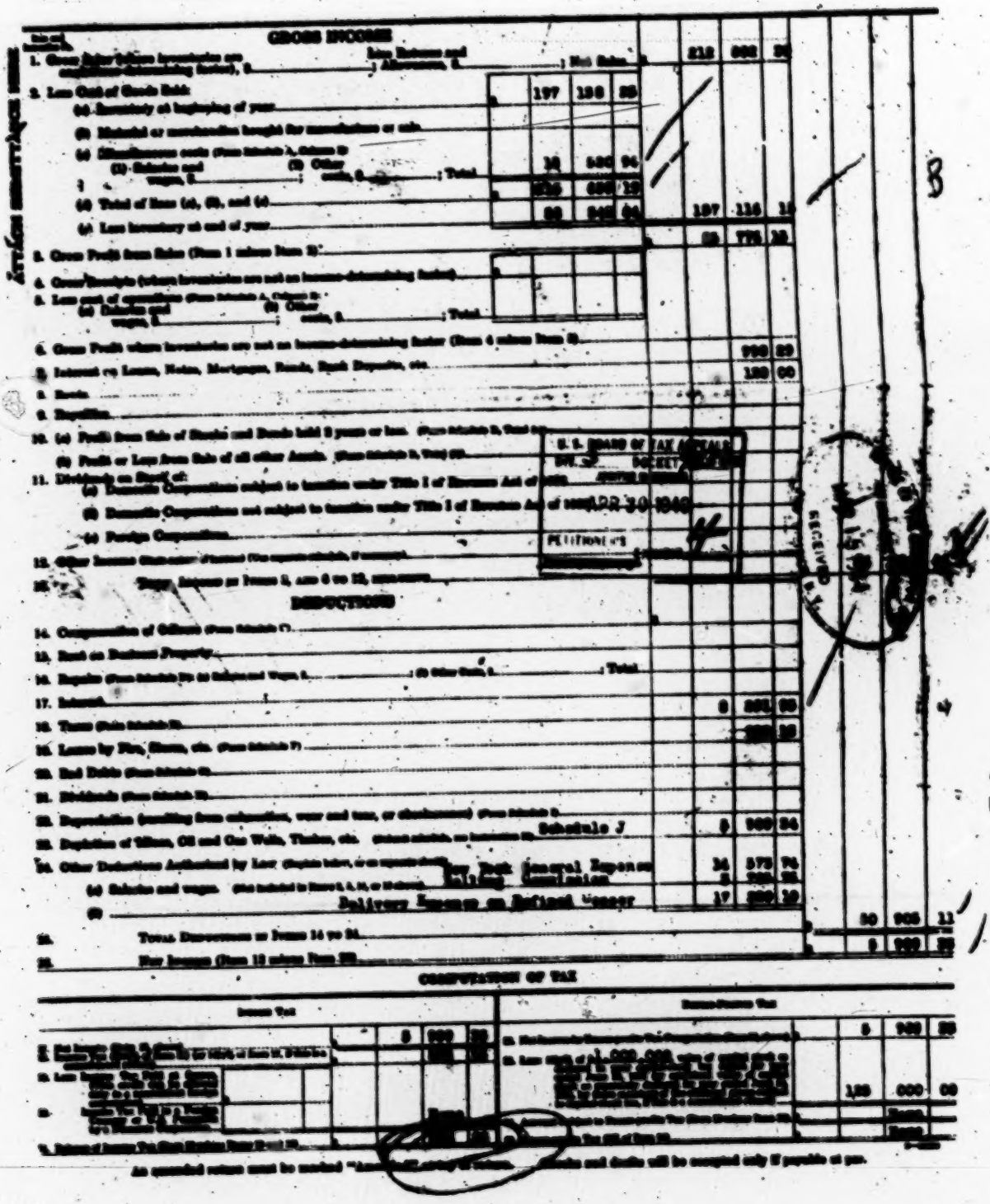
1. Gross Sales (Where Inventories are Considered in Computing Income), Less Returns and Allowances						
2. Less Cost of Goods Sold: (a) Inventory at beginning of year		197	138	85		
(b) Material or merchandise bought for manufacture or sale						
(c) Miscellaneous costs (See Schedule A, Column 2): (1) Salaries and wages; (2) Other costs; Total		38	886	94		
(d) Total of Items (a), (b), and (c)		235	025	79		
(e) Less inventory at end of year		88	848	63	197	176 16
3. Gross Profit from Sales (Item 1 minus Item 2)					88	775 16
4. Gross Receipts (Where Inventories are not an Income-determining Factor)						
5. Less cost of operations (See Schedule A, Column 2): (a) Salaries and wages; (b) Other costs; Total						
6. Gross Profit where Inventories are not an Income-determining Factor (Item 4 minus Item 5)						990 89
7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.						180 00
8. Rents						
9. Royalties						
10. (a) Profit from Sale of Stocks and Bonds held 2 years or less (See Schedule D, Year (a))						
(b) Profit or Loss from Sale of all other Assets (See Schedule D, Year (b))						
11. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1932						
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1932						
(c) Foreign Corporations						
12. Other Income (Explanation of Income This Return Schedule, if necessary)						
13. Total Gross Income as Items 3, and 6 to 12, inclusive						

U.S. BOARD OF TAX APPEALS
DIV. 20 DOCKET
PETITIONER'S

RECEIVED

DEDUCTIONS

14. Compensation of Officers (See Schedule C)						
15. Rent on Business Property						
16. Repairs (See Schedule D) (a) Salaries and Wages; (b) Other Costs; Total						
17. Interest						
18. Taxes (See Schedule E)					8	882 00
19. Losses by Fire, Storm, etc. (See Schedule F)						000 00
20. Bad Debts (See Schedule G)						
21. Dividends (See Schedule H)						
22. Depreciation (Handling from exhaustion, wear and tear, or obsolescence) (See Schedule I)						
23. Depletion of Mines, Oil and Gas Wells, Timber, etc. (See Schedule J)	Schedule J				8	900 84



GROSS INCOME

DEDUCTIONS

COMPUTATION OF TAX

Schedule J

New York General Expense Billing Commission

Delivery Expense on Refund Wagon

U. S. BOARD OF TAX APPEALS

DOCKETED

APR 30 1940

PETITIONER'S

RECEIVED

MAY 15 1940

An amended return must be marked "Amended" at top of return. Dividends and credits will be computed only if payable at par.

1. Net income from Item 19, page 1 of the return			9	999	93	10. Deductions not charged against business income:				
2. Nontaxable income:						(a) Donations, gratuities, and contributions				
(a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia						(b) Income and profits taxes paid to the United States, and such taxes paid to the possessions or foreign countries if claimed as a credit in Item 10, page 1 of the return				
(b) Interest on qualified bonds under the Federal Farm Loan Act, or under such Act as amended						(c) Federal taxes paid on tax-free covenant bonds				
(c) Interest on obligations of the United States or its possessions						(d) Special improvement taxes tending to increase the value of the property assessed				
(d) Dividends (subscribe under Section 26 (b) of the Revenue Act of 1932)						(e) Purchase and futures, additions, or betterments treated as expenses on the books				
(e) Proceeds of life insurance policies paid upon the death of the insured						(f) Depletements and reserves				
(f) Other items of nontaxable income (to be detailed):						(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary				
(1)						(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation				
(2)						(i) Additions to reserve for bad debts which are not included in Item 19, page 1 of return				
(3)						(j) Additions to reserve for contingencies, etc. (to be detailed):				
3. Charges against reserve for bad debts, if Item 19, page 1 of return, is not an addition to a reserve						(1) Depletion			72	179 86
4. Charges against reserve for contingencies, etc. (to be detailed):						(2)				
(a) Write against copper certificates			1	964	24	(3)				
(b)						(k) Other deductions (to be detailed):				
(c)						(1)				
5. Total of Lines 1 to 4, inclusive			7	953	17	(2)				
6. Total from Line 18			72	179	55	(3)				
7. Net profit for year, as shown by books, before any adjustments are made thereto (Line 5 minus Line 6)			64	225	38	11. Total of Lines 10			72	179 55
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year		2	842	617	05	12. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property):				
9. Other credits to surplus (to be detailed):						(a) Date paid ..... Character				
(a)						(b) Date paid ..... Character				
(b)						(c) Date paid ..... Character				
(c)						(d) Date paid ..... Character				
10. Total of Lines 7 to 9, inclusive		2	906	843	43	13. Other debits to surplus (to be detailed):				
11. Total from Line 17						(a)				
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)		2	906	743	43	(b)				
						(c)				
						14. Total of Lines 11 and 13				

NET INCOME OR DEFICIT REPORTED IN RETURN FOR 1932 BEFORE DEDUCTING NET LOSS FOR PRIOR YEAR.

1. Enter amount of net income or deficit for 1932 before deducting net loss for 1931 ..... $ 186,893.18

2. Enter amount included in return for 1932 as net loss for 1931 ..... $ .....

KIND OF BUSINESS

3. State the main business engaged in, also whether acting as principal or as agent or commission; state if inactive or in liquidation:

Copper mining as principal

AFFILIATIONS WITH OTHER CORPORATIONS

SEE INSTRUCTION 40

4. Is this a consolidated return? ..... No ..... If so, procure from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filed in, return to, and filed as a part of this return. See Section 141 of the Revenue Act of 1932 and Instruction 41.

5. Was the income of this corporation included in a consolidated return for the prior year? ..... No .....

If so, give name of corporation which filed the consolidated return. .....

8. Other credits to surplus (to be detailed):				
(a)				
(b)				
(c)				
10. Total of Lines 7 to 9, inclusive	2	906	743	23
11. Total from Line 17				
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)	2	906	743	23

(a) Date paid ..... Charged to				
(b) Date paid ..... Charged to				
(c) Date paid ..... Charged to				
13. Other debits to surplus (to be detailed):				
(a)				
(b)				
(c)				
17. Total of Lines 14 and 16				

NET INCOME OR DEFICIT REPORTED IN RETURN FOR 1932 BEFORE DEDUCTING NET LOSS FOR PRIOR YEAR

1. Enter amount of net income or deficit for 1932 before deducting net loss for 1931 ..... $ 155,883.18

2. Enter amount deducted in return for 1932 on net loss for 1931 ..... $ .....

KIND OF BUSINESS

3. State the main business engaged in, also whether acting as principal or as agent on commission; state if inactive or in liquidation:

Copper Mining as principal

Check the proper blank below to indicate the general industrial division in which the corporation's main income-producing business falls:

- [ ] Agriculture and related industries, including fishing, forestry, ice harvesting, etc.; also leasing of such property.
- [x] Mining and quarrying, including gas and oil wells; also leasing of such property.
- Manufacturing—
  - [ ] Food products and beverages.
  - [ ] Tobacco.
  - [ ] Textiles and textile products.
  - [ ] Leather and leather products.
  - [ ] Rubber and related products.
  - [ ] Lumber and wood products, including fiber furniture.
  - [ ] Paper, pulp and products.
  - [ ] Printing, publishing, and allied businesses.
  - [ ] Chemicals and allied products, including petroleum products.
  - [ ] Stone, clay, and glass products.
  - [ ] Metal and metal products, including precious metals and products.
  - [ ] Other manufacturing.
- [ ] Construction—excavations, buildings, bridges, railroads, ships, etc.; also equipping and installing operating systems, devices, or machinery without their manufacture.
- [ ] Transportation—rail, water, aerial, motor, etc.; also leasing of such facilities.
- [ ] Public utilities—electric light or power, gas (artificial or natural), pipe lines; telephone, telegraph or radio, waterworks, heating, toll bridges, etc.; also leasing of such utilities.
- [ ] Storage—cold storage, grain elevators, warehouses, safe deposit vaults, etc.; also leasing of such property.
- [ ] Trading—wholesale, retail, or commission.
- [x] Service—professional, business, amusement, and domestic, including hotels, restaurants, laundries, etc.
- [ ] Finance—banks and other financial organizations, insurance, real estate; also brokers and agents.

AFFILIATIONS WITH OTHER CORPORATIONS

SEE INSTRUCTION 40

4. Is this a consolidated return? ..... No ..... If so, produce from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return. See Section 141 of the Revenue Act of 1932 and Instruction 41.

5. Was the income of this corporation included in a consolidated return for the prior year? ..... No .....

If so, give name of corporation which filed the consolidated return. .....

PREDECESSOR BUSINESS

6. Did the corporation file a return under the same name for the preceding taxable year? ..... Yes ..... Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? ..... No ..... If answer is "yes," give name and address of such predecessor business, and the date of the change in entity. .....

Upon such change were any asset values increased or decreased? .....

If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN

7. Is this return made on the basis of cash receipts and disbursements? .....

If not, describe fully what other basis or method was used in computing net income. Accruals and reserves

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully; state why used and the date inventory was last recorded with stock.

Cost or market -whichever is lower

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return

Schedule 2 - Depletion

Notice to Corporations.

Deposited in Federal Reserve Bank May 15, 1934
Collector Int. Rev. 2nd Dist. N. Y.

This form should be executed and filed as a part of Corporation Income Tax Form 1120 for the calendar year 1933. If the corporation merely received *advice* from some person or persons employed to assist in the preparation of the return, the name and address of the advisor, together with a statement showing the extent to which such advice was received, is sufficient. If the return was *actually prepared* by any such person or persons, this form must be signed and sworn to by such person or persons. 143

Did the corporation employ anyone especially to prepare or advise in the preparation of its income tax return for the calendar year 1933? (Answer "yes" or "no") No
If so, give name and address and state to what extent such assistance or advice was received: 144

MOTHER LODE COALITION MINES COMPANY

JAMES DEAN,
Treasurer.

I, acting as ..... for the hereto sub-
We, (Attorney or advisor)
scribed taxpayer, affirm that I prepared the return, that
we
the information set out in the return and accompanying schedules, if any, correctly and truly represents the infor-

mation furnished or discovered by me during the course of
us
preparation of the return, and that such information is
true to the best of my information and belief.
our

.....

(Attorney or advisor)

.....

(Address)

146 Sworn to and subscribed before me this ..... day of ....., 1934.

....

(Signature of officer administering oath) (Title)

Notarial Seal

Affidavit.

SCHEDULE J—DEPLETION

JAMES DEAN, Treasurer of the Mother Lode Coalition Mines Company, deposes as follows:

147 1. The taxpayer, Mother Lode Coalition Mines Company, is the owner of copper properties located in the McCarthy Mining Recording District at Kennecott, Alaska.

2. The taxpayer is the owner in fee of the copper properties.

3. The mining properties were acquired by the taxpayer on May 1, 1919.

4. Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932 the taxpayer elects to deduct depletion on the percentage basis for the year 1933 and thereafter.

Depletion on percentage basis for the year 1933 is calculated as follows:—

Gross sales of products of the Mine		$212,892.30
Less:—		
Freight to Smelter	$ 62,267.02	
Smelting & Refining	57,466.23	
Marine Insurance	543.02	
Delivery Expense on Copper	17,329.19	
Selling Expense on Copper	3,785.76	
Administration Expense	14,573.74	
Mine Taxes	15.00	
	$155,979.96	
		155,979.96
Gross Income from Property		$ 56,912.34
Percentage Depletion, being 15% of above Gross Income from Property		$ 8,536.85
Net Income of the Taxpayer		$ 11,978.67
Percentage Depletion allowable, being 50% of above Net Income		$ 5,989.34

149

JAMES DEAN,
Treasurer.

140

New York:
New York:

Sworn to and subscribed before me this 8th day of March, 1934.

E. W. SCHWARZ

Item	Amount	Total	Amount	Total
ASSETS				
1. Cash		$ 228 089 80		$ 456 344 91
2. Notes receivable				
3. Accounts receivable	$ 145 887 72		$ 61 237 71	
Less reserve for bad debts		145 887 72		61 237 71
4. Inventories:				
Raw materials Ores	$ 1 038 80		$	
Work in process				
Finished goods Copper on Hand	196 099 45		58 543 06	
Supplies	977 90		277 90	
		198 116 15		59 520 94
5. Investments (nontaxable):				
Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	$		$	
Securities issued under the Federal Farm Loan Act, or under such Act as amended, and obligations of United States possessions 9				
Obligations of the United States		None		None
6. Other investments:				
Stocks of domestic corporations	$		$	
Bonds of domestic corporations				
Stocks and bonds of foreign corporations				
All other investments or loans	38 553 70	38 553 70	37 794 99	37 794 99
7. Deferred charges:				
Prepaid insurance	$ 1 048 66		$ 1 006 75	
Prepaid taxes				
All other	6 627 33	7 675 99		1 006 75
8. Capital assets:				
Land	$		$	
Buildings & equipment	844 903 14		844 903 14	
Machinery and equipment				
Furniture and fixtures				
Delivery equipment				
Mine property	16 197 274 21		16 197 274 21	
Organization expense	876 309 65		876 309 65	
	$ 17 718 487 00		$ 17 718 487 00	
Less reserves for depreciation (except on land)	17 056 764 19	661 722 81	17 134 933 08	583 553 92
9. Patents				
10. Good will				
11. Other assets (describe fully):	$		$	
12. TOTAL ASSETS		$ 1 279 985 57		$ 1 199 459 22

Obligations of the Unions issues																		
6. Other investments:																		
Stocks of domestic corporations	$								$									
Bonds of domestic corporations																		
Stocks and bonds of foreign corporations																		
All other investments or loans		38	553	70		38	553	70		37	794	99		37	794	99		
7. Deferred charges:																		
Prepaid insurance	$	1	048	66					$	1	006	75						
Prepaid taxes																		
All other		6	627	33		7	675	99						1	006	75		
8. Capital assets:																		
Land	$								$									
Buildings & equipment		644	903	14						644	903	14						
Machinery and equipment																		
Furniture and fixtures																		
Delivery equipment																		
Mine property	16	197	274	21					16	197	274	21						
Organisation expense		876	309	65						876	309	65						
	$ 17	718	487	00					$ 17	718	487	00						
Less reserves for depreciation (except on land)	17	056	764	19		661	722	81	17	134	933	08		583	553	92		
9. Patents																		
10. Good will																		
11. Other assets (describe fully):																		
	$								$									
12. TOTAL ASSETS					$	1	279	988	57					$	1	199	459	22
LIABILITIES																		
13. Notes payable (less than one year)					$									$				
14. Accounts payable						2	770	40							4	327	94	
15. Bonds and notes (not secured by mortgage)																		
16. Mortgages (including bonds and notes so secured)																		
17. Accrued expenses:																		
Interest	$								$									
Taxes		6	275	00						7	275	00						
All other		21	888	41		28	163	41		3	030	50		10	306	50		
18. Other liabilities (describe fully):																		
	$								$									
19. Capital stock:																		
Preferred stock (less stock in treasury)	$								$									
Common stock (less stock in treasury)						4	091	568	81						4	091	568	81
20. Surplus	$								$									
21. Undivided profits						[illegible]	517	05							2	906	743	03
22. TOTAL LIABILITIES					$	1	279	988	57					$	1	199	459	22

Remarks

Page 4 of Return

SCHEDULE A (See Instructions 7 and 8)

Item	Amount	Item	Amount
Salaries and wages	$	Salaries and wages	$
Other costs: Cement Storage	3,684 75	Other costs	
Freight to Boxley	3,772 75		
Hoisting and Refining	7,000 00		
Marine Insurance	88 36		
	14,545 86		

SCHEDULE B—CERTAIN FOREIGN OIL OR GAS STOCKS, BONDS, REAL ESTATE, ETC. (See Instruction 10)

1. Kind of Property (Enter "Stock," "Bonds," "Real Estate," etc.)	2. Date Acquired (Mo., Day, Year)	3. Date Sold (Mo., Day, Year)	4. Amount Realized	5. Cost	6. Market Value Dec. 31, 1936	7. Cost or Adjusted Basis as of March 1, 1913	8. Depreciation Allowed (or Allowable) from March 1, 1913, to Dec. 31, 1936	9. Net Income or Loss
(a) Stocks and bonds* held 2 years or less			$	$	$	$	$	$
Total (a) (amounts not to be carried to Item 10(a))			$	$	$	$	$	$
(b) All other assets:								
Total (b) (amounts not to be carried to Item 10(b))			$	$	$	$	$	$

* As defined in Section 3(c)(2), 1936 Act.

State how property was acquired

SCHEDULE C—CONFIRMATION OF OFFICERS (See Instruction 14)

1. Name of Officer	2. Official Title	3. Total Remuneration of Executive*	Shares of Stock Owned		5. Amount of Compensation (Enter on Page 1, Item 14)
			4. Common	5. Preferred	
					$

SCHEDULE D—COST OF REPAIRS (See Instruction 15)

1. Items	2. Amount (Enter on Page 1, Item 16)
Salaries and wages	$
Other costs	

SCHEDULE E—TAXES PAID (See Instruction 16)

1. Items	2. Amount (Enter on Page 1, Item 17)
State of Delaware	$ 6,875 00
Territory of Alaska	15 00
Federal Check Tax	1 00
Capital Stock Tax	2,000 00
	8,891 00

SCHEDULE F—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 18)

1. Kind of Property	2. Date Acquired	3. Cost or Value as of March 1, 1913 (Insurance Excluded)	4. Proceeds of Insurance	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss (Enter on Page 1, Item 18)
		$	$	$	$	$

State how accounts were considered

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 14)

1. Name of Officer	2. Common Title	3. Time Devoted to Business	Shares of Stock Owned		5. Amount of Compensation (Enter on Page 1)
			4. Common	5. Preferred	

SCHEDULE D—COST OF REPAIRS (See Instruction 15)

1. Items	2. Amount (Enter on Page 1)
Salaries and wages	
Other costs	

SCHEDULE E—TAXES PAID (See Instruction 16)

1. Items	2. Amount (Enter on Page 1)
State of Delaware	6,875 00
Territory of Alaska	15 00
Federal Check Tax	1 95
Capital Stock Tax	2,000 00
	8,891 95

SCHEDULE F—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 19)

1. Date of Property	2. Date Acquired	3. Cost or Value of at March 1, 1913, (Estimated Value)	4. Deduction for Depreciation	5. Depreciation Allowed (or Since Date Acquired)	6. Insurance and Salvage Value	7. Amount to be Taken on Page 1

State how property was acquired

SCHEDULE G—BAD DEBTS (See Instruction 20)

1. Year	2. Amount of Account	3. Date Charged
1920		
1921		
1922		
1923		

SCHEDULE H—DIVIDENDS DEDUCTIBLE (See Instruction 21)

1. Name of Corporation	Amount of Dividends	
	2. Domestic	3. Foreign

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 22)

1. Kind of Property	2. Date Acquired	3. Age When Acquired	4. Estimated Life After Acquisition	5. Cost	6. Value 1, 1913, or Adjusted Basis on Year Date	7. Depreciation Allowed (or Since Acquired) on Prior Years	8. Depreciation Allowable This Year

AFFIDAVIT

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1918 and the Internal Revenue Act and the Regulations issued thereunder.

Sworn to and subscribed before me this 15 day of March, 1924.

(Title) (Title)

(Signature of officer administering oath)

(Signature of person preparing this return, if other than officer)

See Instruction 23. Attach separate sheet if any of the above schedules do not provide sufficient space.

Petitioner's Exhibit 5.

(Admitted in Evidence April 30, 1940.)

U. S. BOARD OF TAX APPEALS

Div. 3, Docket 98500.

Treasury Department
Internal Revenue Service
Jan. 25, 1937.

Office of Internal Revenue Agent in Charge,
17 Battery Pl., NYC 152

In re:
Date of report: Dec. 31, 1936.
Recommendation:

Years	Additional Tax	Overassessment	Penalties
1935	$700.63		
Total			

Mother Lode Coalition Mines Co.,
120 Broadway,
New York, N. Y. 153

Sirs:

The recommendations which this office proposes to make with respect to your income tax liability as the result of a recent examination by an internal revenue agent are shown in the statement attached.

If you acquiesce in the proposed tax liability the enclosed Form 870 should be executed and forwarded to this office. Your consent to the prompt assessment and collection of any deficiency indicated will stop the running of interest on such deficiency upon a date not later than thirty days after the filing of the Form 870 properly executed.

154 *Petitioner's Exhibit 5.*

Should you desire to make immediate payment without awaiting formal assessment and notice and demand, you should forward your remittance to the Collector of Internal Revenue at Custom House, NYC, enclosing this letter, or a copy thereof. If payment is so made the interest period will terminate on the date of payment, and interest on the deficiency at the rate of 6 per centum per annum to the date of your payment to the Collector computed from the due date of the first installment should be included in your remittance.

If you do not acquiesce in the proposed recommendations
155 you should file a protest in writing with this office within 30 days from the date of this letter, stating therein the grounds for your exceptions. Any protest so filed will be given careful consideration, and, if you so desire, you will be given an opportunity for a hearing before the recommendations are forwarded to Washington.

Arrangements will be made by this office upon your request to answer any questions which may occur to you in your review of these recommendations.

In any event please sign the enclosed form acknowledging receipt of this letter and related papers and return such form to this office.

156 Respectfully,

C. R. KRIGBAUM,
Internal Revenue Agent in Charge.

Enclosures:
Statement of adjustments.
Form 870.
Form of acknowledgment.
ML:kmc

Petitioner's Exhibit 5. 157

Preliminary Statement.

Index to Report:
Pages 1 to 7.
Schedules 1 to 3.
Exhibits A to D.

Summary.

Year ended	Additional taxes
12/31/35	$700.63

The additional tax was caused by disallowing shut-down expense applicable to prior period, less an increased accrual 158
allowed for 1936 Federal Capital Stock tax.

The changes were explained to James Dean, treasurer, who verbally assented. Form agreement was withheld pending receipt of final report.

Schedule No. 1.

Adjustments to Net Income:		Year Ending: 12/31/35
Net as disclosed by return		$63,466.00
As corrected		68,561.55
Net adjustment as computed below		5,095.55

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Unallowable deductions and additional income;		
A. Shut-down expense	$7,784.65	
B. Donation	4.50	
Total		7,789.15

Nontaxable income and additional deductions:		
C. Capital stock accrued	$2,693.60	
Net adjustment as above		$5,095.55

160 *Petitioner's Exhibit 5.*

Schedule No. 1a

Explanation of Items:

A—Shut-down expense, $7,784.65.

Owing to controversy with Kennecott Corporation regarding charges for this expense which was finally adjusted in 1935, the records show that the above amount applicable to the year 1934 was taken as a deduction for the year 1934. Same was not allowable on the accrual basis used by the taxpayer.

161 B—Donation, $4.50.

Voucher 12/7 shows a contribution of this amount to U. S. Hospital Campaign Committed. Same not allowable under the provisions of Article 23 (o)-2 of Regulations 86.

C—Capital stock tax accrued, $2,693.60.

The taxpayer deducted $1,306.40 which represented the accrual under the Revenue Act of 1935. A new declaration was made under the Revenue Act of 1936 and tax paid for the year ended 6/30/36 of $4,000.00. The additional accrual of $2,693.60 has been allowed for 1935 in accordance with the Bureau's ruling.

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Name of Corporation: Motor Sales Coalition Mines Corp. [illegible]

Schedule No. 8

Computation of [illegible] for [illegible] Year Ended 12/31/35

INCOME TAX

Calendar Year Returns:

Net income	68,961.55	
Less: [illegible]		
Income tax [illegible] per cent on		9,427.81

Fiscal Year Returns:

Net income (less Credits) under 1932 Act		
Net income (less Credits) under 1932 Act as amended		
Income Tax at 1932 Rates: /12ths of $ at per cent		
Income Tax at 1933 Rates: /12ths of $ at per cent		
Total tax		
Less: Income tax paid at source		
Foreign income and profits taxes		
Total tax assessable		
Total previously assessed		
Additional income tax to be assessed (Overassessment)		

Plus: Penalties ___% on $ ___ $ ___

___% on ___ ___

___% on ___ ___

Additional income tax and penalties to be assessed (Overassessment) $

EXCESS PROFITS TAX

Net income [illegible]	68,961.55	
Less 12½% of $ [illegible] Value declared in Capital Stock Return	180,137.72	
Balance subject to 5% tax		
Total excess profits tax assessable		
Total previously assessed		
Additional excess profits tax to be assessed (Overassessment)		

Plus: Penalties ___% on $ ___ $ ___

___% on ___ ___

___% on ___ ___

Additional excess profits tax and penalties to be assessed (Overassessment) $

Total additional income [illegible] to be assessed (Overassessment)

(N.Y. Form 277)

Form 990-B (Rev. Jan. 1936)
TREASURY DEPARTMENT
Internal Revenue Service

Name Bother Lode Coalition Mines Co. 85

Exhibit A Year Period ended 12/31/35

ANALYSIS OF SURPLUS AND RECONCILIATION OF AMENDED SURPLUS WITH AMENDED TAXABLE NET INCOME

Item	Per Books	Amended
Surplus beginning of period	(2,967,927.74)	(2,967,927.74)
Add:		
Income per books and corrected taxable net income	43,362 21	68,561 95
Sustainable income for period:		
Add'l accrual of 1936 Cap Stock Tax	7,693 00	
Res. for copper Ctfs. trans. to P & L.	44,883 57	
Other credits to surplus during period:		
	(2,879,987.96)	(2,852,189.02)
Deduct:		
Dividends (dates):		
Income taxes Provision for 1935 tax	8,786 58	
Unallowable deductions:		
Book depletion not taken	72,860 78	
Shut-down expense appl.to 1934	7,788 85	
Donation	5 00	
Other charges to surplus during period:		
		72,376 51
Surplus end of period	(2,879,987.96)	(2,852,189.02)

Petitioner's Exhibit 5. 163

Mother Lode Coalition Mines Co. #6

EXHIBIT B

ANALYSIS OF ACCRUED TAXES: YEAR ENDING: 12/31/35

Date	Item	Debit	Credit	Balance
12/31/34	Balance			$7,275.00
	Acrued to Profit & Loss:			
1935	Delaware Franchise tax		5,275.00	
"	Capital stock Tax		1,306.40	
"	Alaska License Tax		1,720.71	
"	Alaska Mine Tax		15.00	
"	N Y C Sales Tax		7.38	
"	Fed. Income tax, 1935		8,726.58	18,051.07
	Total			25,326.07
1935	1934 Taxes paid (cash)	7,258.38		7,258.38
12/31/35	Balance			$18,067.69

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Exhibit C—Reserve for Copper Certificates

(Shown as credit against item 6(d) of Balance Sheet.

12/31/34	Balance			44,483.57
1935	Transferred to Profit and Loss	44,483.57		
12/31/35	Balance			none

Exhibit D—Reserve for Depletion

12/31/34	Balance			16,515,174.45
1935	Profit & Loss (1935 Depln.)		81,137.66	
12/31/35	Balance			16,596.312.11

SCHEDULE NO. 3.

STATEMENT OF TAX LIABILITY

INCOME TAX

Year	Tax previously assessed	Adjustments proposed in accompanying report Deficiency	Correct Income Tax liability
12/31/35	$8,726.58	$700.63	$9,427.21

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166 *Petitioner's Exhibit 6.*

Petitioner's Exhibit 6.

U. S. Board of Tax Appeals. Div. 3. Docket 98500. Admitted to evidence Apr. 30, 1940.

TREASURY DEPARTMENT
Internal Revenue Service
January 19, 1939

Office of
Internal Revenue Agent in Charge
2nd, NY Division
90 Church St., NYC.

167 Mother Lode Coalition Mines Co.,
120 Broadway,
New York, N. Y.

Sirs:

I enclose a copy of the report of the examination of your income-tax returns for the years shown below. After consideration by this office, the following adjustment of your tax liability appears to be warranted, for the reasons stated in the report:

Year: 1935 Deficiency—Income Tax: $3,475.57

If you agree to this adjustment, the enclosed form of
168 waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and to stop the accumulation of interest. Such interest will cease 10 days after the receipt of the executed form, or upon the payment of the additional tax to the collector, whichever occurs first.

If you desire to make immediate payment of the additional tax without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at Custom House, NYC, enclosing this letter, or a copy thereof. Interest on the additional tax should be included in your remittance, computed at the rate of 6 percent per annum from the due date of the first installment to the date of payment.

If you do not agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with this

office, within 10 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration, and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency against you. This letter is not a final notice of deficiency, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to pay the additional tax to the collector of internal revenue or to file with this office within the 10 day period mentioned either a waiver on the enclosed form or a written protest, final determination of your tax liability will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of income- and profits-tax deficiencies. 170

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

C. R. KRIGBAUM,
Internal Revenue Agent in Charge.

Enclosures: 171
Report of examination.
Form of waiver.
Form of acknowledgment.
HJ

#1

Mother Lode Coalition Mines Co.
120 Broadway
New York, N. Y.

PRELIMINARY STATEMENT

INDEX TO REPORT

Pages: 1-5
Schedules: 1-3
Exhibits: None

172 *Petitioner's Exhibit 6.*

SUMMARY

Year Ended	Additional Tax
12/31/1935	$3,475.57

Net Additional Tax: $3,475.57

Principal causes of additional tax:

The additional tax was caused by disallowing percentage depletion.

This report is supplemental to previous report dated December 31, 1936.

The changes were explained to James Dean, Treasurer. Agreement was not obtainable.

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Schedule No. 1.
Year Ended 12/31/35.
Adjustments to Net Income.

Net income as disclosed by R. A. R. dated 12-31-36		$68,561.55
As corrected		93,838.43
Net adjustment as computed below		25,276.88
Unallowable deductions and additional income:		
(a) Depletion	$25,276.88	
Total		$25,276.88
Nontaxable income and additional deductions		none
174 Net adjustment as above		$25,276.88

Schedule 1-A.
Year Ended 1935.
Explanation of Items Changed.

(a) Depletion $25,276.88.

The taxpayer claimed depletion on the return of the above amount computed on the percentage basis.

The taxpayer failed to state in its return for the year 1934 the election required by Section 114(b)(4) of the Revenue Act of 1934.

The records show that all depletion pertaining to capitalized development was exhausted with the taxable year 1925. No deduction for depletion applicable to the year 1935 was therefore allowable.

Name of Corporation Mother Lode Coalition Mines Co.

Schedule No. 2

Computation of Tax for 1935 Year ( ) ended 12/31/1935

INCOME TAX

Calendar Year Returns:

Net income	$91,838.41	
Income tax 13 3/4 per cent on		$12,902.78

Fiscal Year Returns:

Net income (Loss Credits) under 1932 Act		
Net income (Loss Credits) under 1933 Act as amended		
Income Tax at 1932 Rates: 12/12ths of ___ at ___ per cent		
Income Tax at 1933 Rates: 12/12ths of ___ at ___ per cent		
Total tax		
Less: Income tax paid at source		
Foreign income and profits taxes		$12,902.78
Total tax assessable		$9,427.21
Total previously assessed		$3,475.57
Additional income tax to be assessed (Overassessment)		$3,475.57
Plus: Penalties ___% on		
___% on		
___% on		
Additional income tax and penalties to be assessed (Overassessment)		

EXCESS PROFITS TAX

Net income	$91,838.41	
Less 12½% of $961,101.74 Value declared in Capital Stock Return	120,137.72	
Balance subject to 5% tax		None
Total excess profits tax assessable		
Total previously assessed		
Additional excess profits tax to be assessed (Overassessment)		
Plus: Penalties ___% on		
___% on		
___% on		
Additional excess profits tax and penalties to be assessed (Overassessment)		

Total additional income [redacted] to be assessed (Overassessment) $3,475.57

(N.Y. Form 897)

Name of Corporation Mother Lode Coalition Mines Co.

Schedule No.

STATEMENT OF TAX LIABILITY

INCOME TAX

Year	Tax Previously Assessed	Adjustments Proposed in Accompanying Report: Deficiency	Overassessment	Correct Income Tax Liability
ended 12/31/1935	$ 9,427.83	$ 3,475.57	$	$ 12,903.78
Penalties				
5 19				
5 19				
5 19				
TOTALS	$	$	$	

EXCESS PROFITS TAX

Year	Tax Previously Assessed	Adjustments Proposed in Accompanying Report: Deficiency	Overassessment	Correct Excess Profits Tax Liability
ended 12/31/1936	$ None	$	$	$ None
Penalties				
5 19				
5 19				
5 19				
TOTALS	$	$	$	

NOTE: The amount shown in the first column of the above statements is the amount assessed on the original return except as indicated in the following summary of adjustments previously made:

Income Tax - Year 1935

Original tax			$8,776.26
Deficiency assessed on	Feb.	1937	700.83
or			
Overassessment scheduled on		19	
Net income tax previously assessed			$9,427.83

Excess Profits Tax - Year 19

Original tax			$
Deficiency assessed on		19	
or			
Overassessment scheduled on		19	
Net excess profits tax previously assessed			$

(N.Y.Form 870)

Petitioner's Exhibit 7. 175

Petitioner's Exhibit 7.

(Admitted in Evidence Apr. 30, 1940.)

(Received January 27, 1939 Internal Revenue Agent in Charge, Second New York Division, N. Y. City.)

Mr. C. R. Krigbaum,
Internal Revenue Agent in Charge,
90 Church Street,
New York, N. Y.

Dear Sir: 176

Receipt is acknowledged of your letter of January 19, 1939 enclosing copy of a report of examination of MOTHER LODE COALITION MINES COMPANY income tax return for the year 1935. You advise that you propose the following adjustment of that income tax liability for the year in question.

"Deficiency Income Tax: $3,475.57"

The cause which you assign for this adjustment is as stated in the report of examination, the disallowance of the percentage depletion deduction taken in the 1935 return in the amount $25,276.88. On page 3 of the report the grounds 177 for disallowance are stated as follows:

"(a) Depletion $25,286.88

The taxpayer claimed depletion on the return of the above amount computed on the percentage basis.

The taxpayer failed to state in its return for the year 1934 the election required by Section 114 (b) (4) of the Revenue Act of 1934.

The records show that all depletion pertaining to capitalized development was exhausted with the taxable year 1925. No deduction for depletion applicable to the year 1935 was therefore allowable."

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Taxpayer protests and takes exception to the findings in the report, as well as to the proposed adjustment set forth in your letter.

Moreover, the taxpayer claims first, that it is entitled to percentage depletion for the year 1935 and second, that it was unnecessary for it to make an election to take percentage depletion in its return filed for the year 1934 for the following reasons:

(a) Taxpayer stated in its return for the calendar year 1933 that it elected to take percentage depletion with respect to the property in question for succeeding

179 taxable years, such election being made pursuant to the terms of Section 114 (b) (4) of the Revenue Act of 1932 which provides in part that

> "The depletion allowance in respect of such property for *all* succeeding taxable years shall be computed according to the election thus made". (Emphasis ours)

(b) Taxpayer contends that Section 114 (b) (4) of the Revenue Act of 1934 does *not require* a taxpayer who has already elected under the 1932 Act to make *another* election, but merely gives the taxpayer that privilege. Inasmuch as taxpayer did not change the

180 election made under the 1932 Act, it remains bound by that election, as does also the Treasury Department. Moreover, it is an axiom of law that all doubts on the point must be resolved in favor of the taxpayer and this is particularly pertinent in view of the language used in the report of the Ways and Means Committee (73d Cong., 2d Sess. H. Rept. 704) —which is quoted below:

> "Section 114 (b) (4). Percentage depletion for coal and metal mines and sulphur; Under the Revenue Act of 1932, percentage depletion was first allowed in the case of coal, metal and sulphur mines. That act required the taxpayer to make in his 1933 return an election binding for 1934 and

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subsequent years, as to whether the depletion deduction in such cases was to be computed upon a percentage basis. To avoid administrative complexity, your committee is of the opinion that the taxpayer making his first return under the bill *should be entitled to a new election* as to whether he will compute his allowance for depletion in the case of coal, metal and sulphur mines upon the percentage basis. This section of the bill so provides." (Emphasis ours)

(c) Assuming, but not admitting, for the purposes of argument, that the 1934 Act did *require* "a taxpayer making his first return under this title in respect of 182
a property" to make an election, taxpayer contends that this language must be construed to apply only to a return in respect of a property concerning which a depletion deduction can be claimed. Taxpayer's return for the year 1934 showed a *net loss* without a deduction for depletion, and the question of a deduction for depletion in that return was accordingly impossible and so immaterial. The law does not require the doing of a vain act and the filing of an election with respect to percentage depletion when a depletion deduction was impossible and when no tax was due; would have been a vain gesture. "Statutes should be construed in such a manner as to avoid 183
absurdity or injustice". (See Ralph Leslie Raymond, 34 BTA 1171 at page 1176.) Accordingly, the first return which taxpayer filed under the 1934 Act, wherein depletion deduction was claimable was the return filed for the year *1935* and in that return taxpayer *clearly stated its election* to deduct depletion on a percentage basis. Taxpayer accordingly holds that *if* it was required to make an election under the 1934 Act, *that election has been* properly made.

For the reasons above assigned, taxpayer contends that your proposed action is erroneous and your proposal should be withdrawn.

184 *Praecipe of Record.*

Request is respectfully made for a hearing in order that the protest of the taxpayer herein set out may be considered, at which time the taxpayer will present more in detail its position as above set forth.

Respectfully yours,

MOTHER LODE COALITION MINES COMPANY,

R. C. KLUGESCHEID,

ASC:MG Secretary.

185 Original signed by R. C. Klugescheid.

Sworn to before me this 27th day of January, 1939.

E. W. SCHWARZ,

Notary Public, Nassau County No. 1268

Cert. filed in N. Y. Co. No. 37, Reg. No. 9S98.

Commission expires March 30, 1939.

Praecipe for Record.

(Filed July 11, 1941)

186 UNITED STATES BOARD OF TAX APPEALS

B. T. A. DOCKET No. 98500.

[SAME TITLE]

TO THE CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit

Court of Appeals for the Second Circuit heretofore filed by Mother Lode Coalition Mines Company, petitioner.

1. Docket entries of all proceedings before the Board of Tax Appeals.

2. Pleadings before the Board, as follows:

(a) Petition, including annexed copy of deficiency letter.

(b) Answer of the Respondent.

3. Findings of Fact and Opinion of the Board, promul- 188
gated August 20, 1940.

4. Decision of the Board, entered August 26, 1940.

5. Motion to Vacate Decision and Modify the Findings of Fact and Opinion of the Board, or for Further Hearing to Supplement and Enlarge the Record, with the Board's Order of September 21, 1940, denying said Motion, stamped thereon.

6. Petition for Review together with Notice of Filing Petition for Review and Proof of Service of Notice and copy of Petition for Review.

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7. Statement of Evidence as agreed upon and allowed including Petitioner's Exhibits 1, 3, 4, 5 (excluding page 2 of Exhibit 5, which is not material upon this appeal), Exhibit 6 (excluding pages 2, 3, and 4 of Exhibit 6, which are not material upon this appeal), and Exhibit 7, approved July 12, 1941.

8. This Praecipe.

PAUL E. SHORB,
701 Union Trust Building,
Washington, D. C.
Attorney for Petitioner.

190 *Certificate.*

Service of a copy of the within Praecipe is hereby admitted and said Praecipe is hereby agreed to this 11th day of July, 1941.

J. P. WENCHEL,
Chief Counsel
Bureau of Internal Revenue
Attorney for Respondent.

Certificate.

191 UNITED STATES BOARD OF TAX APPEALS
WASHINGTON

DOCKET No. 98500.

[SAME TITLE]

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 92, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my
192 office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 15th day of July, 1941.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[fol. 85] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1941

No. 47

(Argued January 13, 1942. Decided February 5, 1942)

MOTHER LODE COALITION MINES COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition to review a decision of the United States Board of Tax Appeals

The taxpayer seeks reversal of an order of the Board redetermining a deficiency in income tax for the year 1935. Affirmed.

For opinion below see 42 B. T. A. 596.

Before Swan, Augustus N. Hand and Frank, Circuit Judges

Paul E. Shorb and Charles A. Horsky, Attorneys for Petitioner; Covington, Burling, Rublee, Acheson & Shorb, of Counsel.

Samuel O. Clark, Jr., Assistant Attorney General, J. Louis Monarch, Gerald L. Wallace and Carlton Fox, Special Assistants to the Attorney General, for Respondent.

[fol. 86] SWAN, Circuit Judge:

The question presented is whether the petitioner is entitled under section 114(b) (4) of the Revenue Act of 1934, 48 Stat. 710, to take a deduction in its 1935 return for percentage depletion upon its copper mining property. Disallowance of the deduction resulted in the deficiency tax complained of. The Board has sustained the commissioner's ruling.

The petitioner was the owner of a copper mine located in Alaska and was engaged in the business of mining and selling copper. Prior to 1932 a depletion allowance in the case of metal mines had to be computed on the basis of cost or discovery value. By section 114(b) (4) of the Revenue Act

of 1932, 47 Stat. 203, a new method of computation was introduced based on a percentage "of the gross income from the property during the taxable year" (but not to exceed 50 per cent. of net income therefrom computed without allowance for depletion), and a taxpayer making a return for 1933 as to a property was required to state whether he elected to have the depletion allowance for such property "for succeeding taxable years" computed with or without reference to percentage depletion. In its income tax return for 1933 the petitioner elected percentage depletion "for the year 1933 and thereafter." The provisions of the 1932 Act were reenacted, with slight modifications, in section 114(b) (4) of the Revenue Act of 1934, 48 Stat. 710. During the year 1934 the petitioner mined no copper. Its mine was shut down but it sold certain copper on hand which it had mined in prior years. Its return for 1934 showed a net loss and made no reference whatever to depletion. The commissioner made no adjustments in the 1934 return. In 1935 the petitioner had a profit from its mining operations and in its return for that year reported [fol. 87] net income of $63,466 after deducting $25,276.88 for percentage depletion. The return stated: "Under the provisions of Section 114(b) (4) of the Revenue Act of 1932 the taxpayer elected to deduct depletion on the percentage basis for the year 1933 and thereafter." The commissioner disallowed any deduction for depletion on the ground that section 114(b) (4) of the Act of 1934, required a new election to be stated in the 1934 return,[1] and the petitioner's failure to do so made operative the requirement that depletion allowance for succeeding taxable years be computed without reference to percentage depletion. Since cost basis depletion had been fully recovered by 1925, it is conceded that no deduction on that basis was allowable.

The petitioner's first contention is that having made its election under the 1932 Act it was not required to make a fresh election under the 1934 Act. This flies directly in the

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[1] Before the Board the petitioner contended that an amended return for 1934, filed in 1939, constituted an effective election under the 1934 Act. This contention has not been urged before us, doubtless because of *Riley Co.* v. *Commissioner*, 311 U. S. 55. See also *Scaife Co.* v. *Commissioner*, 314 U. S. — (Dec. 22, 1941).

teeth of the statutory language quoted in the margin.[2] That language is mandatory. A taxpayer desiring percentage [fol. 88] depletion "shall state" his election in "his first return under this title in respect of a property." Section 1, 48 Stat. 683, makes clear that the "first return under this title" is the return for 1934. Hence, if the petitioner's 1934 return was "in respect of" the mine—a matter to be discussed later—a statement of election was required and a failure to make it deprived the petitioner of the privilege of

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[2] Sec. 114. Basis for Depreciation and Depletion.

. . . . . .

(b) Basis for Depletion.—

. . . . . .

(4) Percentage depletion for coal and metal mines and sulphur.—The allowance for depletion under section 23(m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

claiming percentage depletion in subsequent years. Section 114(b) (4) makes no exception in favor of taxpayers who had elected pursuant to the 1932 Act and the courts are not at liberty to imply exceptions in order to avoid harsh results. The privilege was granted "as a matter of legislative grace; the election had to be made in the manner and in the time prescribed by Congress." *Riley Co.* v. *Commissioner*, 311 U. S. 55, 58. The petitioner argues that the legislative history of the section indicates that the new election was intended to be permissive rather than mandatory because the congressional reports referred to it as "permitted" to the taxpayer instead of "required" of him. S. Rep. 558, 73rd Cong., 2d Sess. p. 36; H. Rep. 704, 73rd Cong., 2d Sess. p. 29. Such a tenuous inference can have no weight as against the unambiguous statutory language. Concededly no case supports the petitioner's contention and a prior decision of the Board had rejected it. *C. H. Mead Coal Co.* v. *Commissioner*, 38 B. T. A. 1163, reversed on an-

[fol. 89] other point in 106 F. 2d 388 (C. C. A. 4).

A second string to the petitioner's bow is the contention that its return for 1935 was its "first return" within the meaning of the 1934 Act. Assuming that a fresh election was required under that Act, as we have held in the previous point, the petitioner argues that Congress must have meant by "first return" the first in which a depletion deduction could be claimed. It urges that since depletion on the cost basis had been previously exhausted and its 1934 return showed a net loss which precluded taking a depletion deduction on the percentage basis, there was no occasion to state an election in that return; accordingly, its 1935 return was the "first return" and this did elect percentage depletion. But the statutory language as construed by the Treasury Regulations will not support this contention.

Section 114(b) (4) does not speak of the "first return made by a taxpayer having net income derived from a property." It requires the election to be stated in the first return made "in respect of a property." The commissioner contends, and we think rightly, that the 1934 return was a return "in respect of" the petitioner's mine. It reported gross income derived therefrom by sales of ore previously mined and it claimed deduction of expenditures on account of the property. The commissioner's position is supported by the regulations promulgated under the 1934 Act. By Article 23(m)5 of Treasury Regulations 86 the taxpayer is

required in his first return for a taxable year beginning after December 31, 1933 to "state as to each property with respect to which the taxpayer has any item of income or deduction whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to depletion allowance." Being phrased in general terms, the statute is an appropriate subject for interpretative administrative regulation. *Hel-*
[fol. 90] *vering* v. *Reynolds Co.*, 306 U. S. 110, 114. In our opinion Article 25(m)5 as above quoted is a reasonable one.[3] Percentage depletion is computed upon gross income although the permissible allowance therefor is limited to a percentage of the taxpayer's net income. Cost depletion is not so limited. Therefore a taxpayer who reports gross income from a mining property may properly be required to state his election as to the method of computing depletion allowance for such property, even though he can get no benefit in that year from electing percentage depletion, because the statute makes his election controlling in future taxable years and imposes upon him an election of the method of cost depletion if he fails to state an election of percentage depletion. It must be obvious, we think, that if the petitioner's mine had had depletable cost in 1934, the petitioner would have been put to an election in its return for that year although no net income was reported. The fact that in the case of certain taxpayers, like the petitioner, cost depletion has previously been exhausted can have no bearing, so far as we are able to see, upon either the construction of the statutory phrase "first return • • • in respect of" the property or the reasonableness of the administrative interpretation given it by the regulation under discussion. Moreover, the construction for which the petitioner contends would introduce administrative difficulties. If a return showing no net income is not a "first return" when filed, does it become one years later if the commissioner shall make adjustments which result in disclosing net income? Cf. *Kehoe-Berge Coal Co.* v. *Commissioner*, 117 F. 2d 439 (C. C. A. 3). Section 114(b)(4)

[3] The same construction of identical language in the Revenue Acts of 1936, 1938 and the Internal Revenue Code has been repeated in Article 23(m)5 of Treasury Regulations 94 and 101 and section 19.23(m)5 of Treasury Regulations 103.

will be much simpler in administration under the commissioner's interpretation. Tax officials will look first to the [fol. 91] taxpayer's 1934 return. If this reports items of gross income from a mining property they need look no further to ascertain the method of computing depletion allowance for such property in future years; if it does not, then they must find the "first return in respect of" such property in some later year. In our opinion the Board correctly held that the petitioner was required to state its election in its 1934 return.

This view is not the one adopted by the Third Circuit in *Pittston-Duryea Coal Co. v. Commissioner*, 117 F. 2d 436. That opinion, however, does not discuss the phrase "first return in respect of a property" nor Article 23(m)5 of Treasury Regulations 86. For the reasons already stated we must with all deference decline to follow it.

Order affirmed.

[fol. 92] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of February, one thousand nine hundred and forty-two.

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

MOTHER LODE COALITION MINES COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordanee with this decree.

D. E. Roberts, Clerk, by A. M. Bell, Deputy Clerk.

[fol. 93] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Mother Lode Coalition Mines Co. v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 21, 1942. D. E. Roberts, Clerk.

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 8, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question stated in the Government's memorandum, and the case is placed on the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~1249~~ 94

MOTHER LODE COALITION MINES COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL E. SHORB,
CHARLES A. HORSKY,
Attorneys for Petitioner

Of Counsel:

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB.

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ——

MOTHER LODE COALITION MINES COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on February 21, 1942 (R. 90).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15) is reported at 42 B.T.A. 596. The opinion of the Circuit Court of Appeals (R. 85) is reported at 125 F.(2) 657.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 21, 1942 (R. 90). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled under Section 114(b)(4) of the Revenue Act of 1934 to take a deduction for percentage depletion in its 1935 return.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 9-12.

STATEMENT

The petitioner, a corporation organized under the laws of the State of Delaware, acquired a copper mining property in Alaska in 1919, and for many years thereafter engaged in the business of mining and selling copper (R. 11-12). Prior to the Revenue Act of 1932, the depletion allowance for metal mines had been computed on the basis of cost or discovery value. Section 114(b)(4) of that Act, *infra*, p. 9, introduced a new method of computation—percentage depletion. In the case of metal mines, it provided an allowance for depletion of fifteen percent of the gross income from the property, if such allowance did not exceed fifty percent of the net income of the taxpayer computed without allowance for depletion. The section further provided that the taxpayer should state in the 1933 return whether he elected to have the depletion allowance for the succeeding taxable years computed with or without reference to percentage depletion. In

its income tax return for 1933, the petitioner, which had exhausted cost depletion (R. 12, 47), naturally made an election of depletion "on the percentage basis for the year 1933 and thereafter" (R. 13).

The provisions of the 1932 Act were re-enacted, with slight modifications, in Section 114(b)(4) of the Revenue Act of 1934, *infra*, p. 10. This Section, which granted the same allowance for depletion, continued as follows:

> "A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion."

During the year 1934, the petitioner stopped mining operations and shut down its mine, although it sold some copper which had been mined in prior years (R. 12). Its return for that year showed a net loss of $38,898.26 (R. 13, 45, 49). The treasurer of the petitioner, who prepared that return, believed that it was not entitled to any deduction for depletion because it had no net income in 1934 and it could have, therefore, no depletion allowance (R. 14, 45). Moreover, he considered the election made in the 1933 return and concluded that petitioner had made a binding election for succeeding years (R. 14, 45). Consequently, no reference whatever was made to depletion in the 1934 re-

turn (R. 14). The respondent made no adjustments in petitioner's 1934 return.

In 1935 the petitioner resumed mining operations, and its return for that year showed a net income of $63,466.00. In its return the petitioner claimed a deduction of $25,276.88 for percentage depletion (R. 11-12). The return contained the following statement (R. 12):

> "Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932, the taxpayer elected to deduct depletion on the percentage basis for the year 1933 and thereafter."

The 1935 return was reviewed, and a report made by the Internal Revenue Agent dated December 31, 1936, which made no change in the petitioner's deduction for percentage depletion (R. 67-73). More than two years later, a second Agent's report disallowed the deduction (R. 14, 76), and the Commissioner thereupon determined a deficiency in the amount of $3,475.57 (R. 6-7). The Board of Tax Appeals sustained that determination (R. 20). The Circuit Court of Appeals for the Second Circuit affirmed (R. 90):

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that under Section 114(b)(4) of the Revenue Act of 1934 the petitioner was required to state its election of percentage depletion in the 1934 return.

2. In failing to hold that petitioner's election of percentage depletion for 1933 and thereafter constituted a valid election under Section 114(b)(4) of the Revenue Act of 1934.

3. In failing to hold that petitioner's original return for 1935 was the "first return" under the Revenue Act of 1934 within the definition of Section 114(b)(4) of that Act.

4. In holding that petitioner was not entitled to a deduction for percentage depletion for the year 1935.

5. In affirming the order of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

By the provisions of Section 114(b)(4) of the Revenue Act of 1932, taxpayers were allowed to elect percentage depletion upon the condition that depletion "for all succeeding taxable years shall be computed according to the election thus made". Pursuant to that section, the petitioner made that election "for 1933 and thereafter." In 1934, when the property showed a net loss, not only was there no occasion for a mention of depletion, but the petitioner's officers believed that the election they had made the year before was still binding. On these facts, the petitioner has urged, before both the Board of Tax Appeals and the court below, that its election under the 1932 Act was effective under the 1934 Act, and, alternatively, that if a fresh election were necessary under the 1934 Act, the 1935 return, which elected percentage depletion, was the "first return" under the 1934 Act. Both of these contentions were rejected by the Board and the court below, although the Board has since changed its opinion on the latter. *Tonopah Mining Co.* v. *Commissioner*, 44 B. T. A. 165, 168, *aff'd.*, C. C. A. 3, March 17, 1942, C. C. H. Fed. Tax Serv. (1942) ¶ 9351. We submit that the decision below should be reviewed by this Court for several reasons.

1. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436. In that case the court held that under the Revenue Act of 1934, the taxpayer was not required to state its election of percentage depletion in its 1934 return when that return showed a net loss without any allowance for depletion. This conflict is expressly noted by the court below (R. 90):

> "This view is not the one adopted by the Third Circuit in *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. 2d 436. That opinion, however, does not discuss the phrase 'first return in respect of a property' nor Article 23(m)5 of Treasury Regulations 86. For the reasons already stated we must with all deference decline to follow it."

The Circuit Court of Appeals for the Third Circuit has acknowledged the conflict in *Tonopah Mining Co.* v. *Commissioner, supra*, in which it cited the *Pittston-Duryea* case, saying (ftn. 6):

> "The Second Circuit Court of Appeals has held, contra, criticising our decision. *Mother Lode Coalition Mines Co.* v. *Comm'r.*, 1942, 4 C. C. H., Para. 9264."

2. The decision of the Circuit Court of Appeals that the petitioner was required under the 1934 Act, to make a fresh election, gave no weight to the unmistakable Congressional intent. The legislative history of the 1934 Act shows conclusively that Congress did not intend to require a fresh declaration from taxpayers who had already made an election to take percentage depletion under the 1932 Act but rather that it was merely giving a fresh opportunity to make such a declaration. The taxpayer was not to be compelled to make a new

election, but was to be "entitled" or "permitted" to do so. (H. Rep. 704, 73d Cong., 2d Sess., p. 29, S. Rep. 558, 73d Cong., 2d Sess., p. 36). See also 78 Cong. Rec. 2922.

The lower court predicated its decision upon the assumption that the statutory language was unambiguous and mandatory. But the words "shall state" are not necessarily imperative. "The context and the expressive intention of the writer may, of course, often set aside the application of the grammarians' rules" to the effect that "shall", when used in the third person, is expressive of some authority or compulsion on the speaker's part. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d Ed. Unabridged), p. 2300. See *Escoe* v. *Zerbst*, 295 U. S. 490, 493; *cf. West Wisconsin Railway Co.* v. *Foley*, 94 U. S. 100, 103; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 534. In short, the statute is ambiguous on its face, and only by recourse to the expressed intention of Congress could it be determined whether "shall state" conveyed permission or command. The error of the court below in disregarding the clear expressions of legislative intent not only departed from the well-established decisions of this Court, *Wright* v. *Vinton Branch*, 300 U. S. 440, 463, and cases cited, but also creates an erroneous gloss upon an important Federal statute. On both grounds the error should be corrected by this Court.

3. Moreover, not merely similar, but the precise questions at issue are of continuing importance in the tax statutes. The language of Section 114(b)(4) of the 1934 Act was re-enacted in the Revenue Acts of 1936 and 1938. 49 Stat. 1686-87; 52 Stat. 495-96. In addition, the later statutes provide that "for the purpose of determining whether the method of computing the de-

pletion allowance follows the property", they shall be considered a continuation of Section 114(b)(4) of the 1934 Act and as giving no new election in cases where that section "would, if applied, give no new election". *Cf. Tonopah Mining Co.* v. *Commissioner,* C. C. A. 3, March 17, 1942, C. C. H. Fed. Tax Serv. (1942) ¶ 9351.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

PAUL E. SHORB,
CHARLES A. HORSKY,
701 Union Trust Building,
Washington, D. C.,
Attorneys for Petitioner.

Of Counsel:
COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB.

May, 1942

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169.

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(b) Basis for Depletion—

(4) *Percentage Depletion for Coal and Metal Mines and Sulphur.*—The allowance for depletion shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance for the taxable year 1932 or 1933 be less than it would be if computed without reference to this paragraph. A taxpayer making return for the taxable year 1933 shall state in such return, as to each property (or, if he first makes return in respect of a property for any taxable year after the taxable year 1933, then in such first return), whether he elects to have the depletion allowance for such property for succeeding taxable years computed with or without reference to percentage depletion. The depletion allowance in respect of such property for all succeeding taxable years shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for succeeding taxable years shall be computed without reference to percentage depletion.

* * *

Regulations 77, promulgated under the Revenue Act of 1932:

ART. 225. Computation of depletion based on a percentage of income in the case of coal mines, metal mines, and sulphur mines or deposits.—

* * *

In the return for the taxable year 1933 the taxpayer must state as to each property whether he elects to have the depletion allowance for each property for 1934 and succeeding

taxable years computed with or without reference to percentage depletion.—In the case of any property in respect of which a return is first made by the taxpayer in a year subsequent to 1933, the taxpayer must state as to each property whether he elects to have the depletion allowance for succeeding taxable years computed with or without reference to percentage depletion. An election once exercised under section 114(b)(4) and this article can not thereafter be changed by the taxpayer, and the depletion allowance in respect of each such property will for all succeeding taxable years be computed in accordance with the election so made. If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion.

* * *

Revenue Act of 1934, c. 277, 48 Stat. 680.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion * * *

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(b) Basis for Depletion.—

(4) *Percentage Depletion for Coal and Metal Mines and Sulphur.*—The allowance for depletion under section 23(m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for

depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

Regulations 86, promulgated under the Revenue Act of 1934:

ART. 23(m)-5. Computation of depletion based on a percentage of income in the case of coal mines, metal mines, and sulphur mines or deposits.—Under section 114(b)(4) a taxpayer may deduct for depletion an amount equal to 5 per cent of the gross income from the property during the taxable year in the case of coal mines, an amount equal to 15 per cent of the gross income from the property during the taxable year in the case of metal mines, and an amount equal to 23 per cent of the gross income from the property during the taxable year in the case of sulphur mines or deposits, but such deduction shall not in any case exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. (For definitions of "gross income from the property" and "net income of the taxpayer (computed without allowance for depletion) from the property," see article 23(m)-1 (g) and (h).)

In his first return made under Title I of the Act (for a taxable year beginning after December 31, 1933) the taxpayer must state as to each property with respect to which the taxpayer has any item of income or deduction whether he elects to have the depletion allowance for each such property for the taxable year computed with or without refer-

ence to percentage depletion. An election once exercised under section 114 (b)(4) and this article can not thereafter be changed by the taxpayer, and the depletion allowance in respect of each such property will for all succeeding taxable years be computed in accordance with the election so made. If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion. The method, determined under section 114(b)(4) and this article, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 94.

MOTHER LODE COALITION MINES COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 85-90) is recorded in 125 F. (2d) 625-27. The findings of fact and opinion of the Board of Tax Appeals (R. 11-20) are recorded in 42 B. T. A. 596.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered February 21, 1942 (R. 90-91). The petition for a writ of certiorari was filed May 19, 1942, and was granted on June 8, 1942, limited to the first question stated in the Government's memorandum (R. 91). A petition requesting that the writ be granted without limitation was denied

October 19, 1942. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

In its income tax return for 1934, the petitioner reported a net loss from its copper mining property without any allowance for depletion. In its income tax return for the year 1935, it reported net income from the property after an allowance for percentage depletion. Which of these two returns is the "first return" made by the taxpayer under Section 114 (b) (4) of the Revenue Act of 1934?

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 19-22.

STATEMENT.

The petitioner is a corporation engaged in the business of mining and selling copper from its copper mining property located near Kennecott, Alaska. The mine was acquired in 1919 (R. 12).

Prior to the effective date of the Revenue Act of 1932, the allowance for depletion for metal mines had been computed solely upon the basis of cost or discovery value. That Act introduced a new method of computing depletion, based upon a percentage of income. Taxpayers were directed to state in their returns for 1933 whether they elected to have the depletion allowance for their property for succeeding taxable years computed with or without reference to percentage depletion. The petitioner had already exhausted its cost depletion in 1925 (R. 12, 15, 47). In its income tax return for 1933, it therefore elected percentage depletion "for the year 1933 and thereafter." (R. 13).

During the year 1934, the mine was shut down, and the petitioner stopped all mining operations. It did, however, sell certain copper which had been mined in prior years

(R. 12). Its income tax return for 1934 showed a net loss of $38,898.26 without any allowance for depletion. The treasurer of the petitioner, who had prepared the return, believed that it was not entitled to any deduction for percentage depletion for 1934 because it had no net income that year (R. 14, 45). Moreover, he considered the election made in the 1933 return still binding (R. 14). Consequently, he thought it unnecessary to make any reference to percentage depletion in the 1934 return.

In 1935 the petitioner reopened the mine, resumed mining operations and reported a net income of $63,466.00 for the year after a deduction of $25,276.88 for percentage depletion (R. 11-12). The 1935 return contained the following statement (R. 12):

> "Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932, the taxpayer elected to deduct depletion on the percentage basis for the year 1933 and thereafter."

The 1935 return was reviewed, and a report made by the Internal Revenue Agent dated December 31, 1936, which made no change in the petitioner's deduction for percentage depletion (R. 67-73). More than two years later, a second Agent's report disallowed the deduction (R. 14, 76), and the Commissioner thereupon determined a deficiency in the amount of $3,475.57 (R. 6-7). The Board of Tax Appeals sustained that determination (R. 20). The Circuit Court of Appeals for the Second Circuit affirmed (R. 90). That court held that, despite the election in the 1933 return under the 1932 Act, the petitioner was required to make a fresh election under the 1934 Act and, moreover, that the petitioner was required to state that election in its 1934 return (R. 86-90). On June 8, 1942, this Court granted the petition for a writ of certiorari, "limited to the first question stated in the Government's memorandum. . . ." (R. 90). A petition praying the Court to reconsider its order and to issue a writ of certiorari without limitation as to scope, was denied on October 19, 1942.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that under Section 114 (b) (4) of the Revenue Act of 1934 the petitioner was required to state its election of percentage depletion in the 1934 return.

2. In failing to hold that petitioner's original return for 1935 was the "first return" under the Revenue Act of 1934 within the definition of Section 114 (b) (4) of that Act.

3. In holding that petitioner was not entitled to a deduction for percentage depletion for the year 1935.

4. In affirming the order of the Board of Tax Appeals.

SUMMARY OF ARGUMENT.

A.

We insist that the petitioner's "first return" within the meaning of Section 114 (b) (4) of the Revenue Act of 1934 was its return for 1935, in which it reported net income for the first time after the enactment of that statute. Every word in that section must be given meaning, and when that is done, the "first return" must necessarily be the first in which the taxpayer has an election between cost and percentage depletion. Not until that return can he state his election to have "the depletion allowance for such property for the taxable year for which the return is made" computed with or without regard to percentage depletion. Not until that return can the statutory words "the depletion allowance . . . for such year shall be computed according to the election thus made" be given effect. This construction accords with this court's settled rules of statutory construction, and gives effect to the obvious purpose of Congress. It is squarely supported by *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436, (C. C. A. 3d), and by the latest views of the Board of Tax Appeals.

B.

The administrative construction of Section 114 (b) (4), which apparently makes the existence of gross income the test of "first return", is entitled to no weight. First, the statute is unambiguous, and administrative construction is unnecessary and ineffective. Second, the Commissioner's regulation is clearly contrary to the intendment of Congress. That intendment is demonstrated, not only by the statutory language, but also by the action of Congress in amending Section 114 (b) (4) when its attention was drawn to the regulation by court decisions. The unmistakable purpose of the change was to clarify the original intent which had been ignored by the Commissioner.

ARGUMENT.

Petitioner's Return for 1935 was the "First Return" Within the Meaning of Section 114 (b) (4) of the Revenue Act of 1934.

The problem in this case is simple: What was the "first return" within the meaning of Section 114 (b) (4) of the Revenue Act of 1934 (*infra*, pp. 19-20)?

We say that the 1935 return was the "first return" because it was the first under the 1934 Act in which the taxpayer reported net income and thus had an election to make a statement as to any form of depletion and make a computation pursuant thereto. The Commissioner has taken the position that the 1934 return was the first because it showed items of gross income and deductions "in respect of a property." The lower court sustained the Commissioner, apparently because he had set forth this view of Section 114 (b) (4) in the Treasury Regulations for the Act of 1934. (Reg. 86, Art. 23 (m)-5.)

The vice of the Commissioner's and lower court's construction is that it fails to give any effect whatever to a very large portion of Section 114 (b) (4). The clause "making his first return under this title in respect of a

property," upon which both rely, is not a discrete grammatical entity, but rather an integral part of both the sentence and the section in which it appears. More than that, both the Commissioner and the court below gave no effect to the obvious purpose of Congress in enacting Section 114 (b) (4). If, as we believe, the Treasury Regulation is patently contrary to the intention of Congress, it can add nothing to the Commissioner's position and should have been disregarded by the lower court.

A. The "first return" in section 114 (b) (4) means the first return in which the taxpayer is entitled to a depletion allowance.

The lower court to the contrary notwithstanding, we do not seek to add anything new to Section 114 (b) (4). Rather, we urge simply that the Court apply well settled principles of statutory construction and accord every word in the statute the meaning it had for Congress. If that be done, there can be no doubt that the "first return" is the 1935 return.

It is elementary, of course, that in the construction of Federal statutes the intent of Congress is paramount. *United States* v. *American Trucking Association*, 310 U. S. 534, 542; *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132, 135. Everything else is subordinate. Moreover, that intent is not to be gleaned from dissociated words or clauses; the whole of the statute, and of necessity the whole of the particular section involved, is to be given full weight. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 463; *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172, 190; *Brown* v. *Duchesne*, 19 How. 183, 194; *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U. S. 634, 638; *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

This principle the Commissioner's interpretation of Section 114 (b) (4) ignores. The Commissioner emphasizes the words "first return . . . in respect of a property" to

the apparent exclusion of everything else in the section. Not only does he overlook their function in the scheme of Section 114 (b) (4) but he seems even to disregard their relation to the remainder of the sentence in which they appear.

Section 114 (b) (4) of the 1934 Act provides that a—

> "Taxpayer making his first return under this title in respect of a property shall state whether he elects to have *the depletion allowance for such property for the taxable year for which the return is made computed* with or without regard to percentage depletion, *and the depletion allowance in respect of such property for such year shall be computed* according to the election thus made." (Italics supplied).

When that sentence is read as a whole, it is plainly not enough that a return be "in respect of a property" in order to be a "first return", nor is it sufficient that it shows items of gross income and deductions. As the italicized portions of the above quotation show, the "first return", to fit the entire sentence, must be a return in which the taxpayer can elect to have the depletion allowance "for the taxable year for which the return is made *computed*" on the cost or percentage basis, and a return which allows effect to be given to the provision that the depletion allowance "for such year *shall be computed*" according to the election thus made. Each of these requirements must be met. That is why they are contained in the Act.

Such being the language of the sentence, we submit that a return does not become a "first return" under the Act simply because it is "in respect of a property"[1] and shows items of gross income and deductions. The statute clearly means by "first return" the return for the first year after December 31, 1933, in which an election is possible, and in which, by the same token, a computation of depletion can

[1] The phrase "in respect of a property" obviously includes a metal mining property, as the Circuit Court of Appeals held (R. 88).

and shall be made. Viewed realistically, the election is between cost and percentage depletion. But none can be made in a taxable year in which the taxpayer can take neither cost nor percentage depletion. Certainly the return for such a year is not one in which the taxpayer can elect to have "the depletion allowance . . . for the taxable year for which the return is made" computed in any particular way—that is, with or without regard to a percentage basis. Items of gross income are utterly immaterial if there can be no depletion allowance of any kind. The "taxable year for which the return is made" clearly means the year in which the "first return" is made. It is the year in which the taxpayer can make an election of cost or percentage depletion and in which the depletion allowance "for such year" can be computed according to the election made. In this case that year was 1935, when the property produced net income.

This view is supported by consideration of the term "depletion *allowance*", as used in Section 114 (b) (4) of the Revenue Act of 1934. This may be an allowance for cost depletion, which is intended to return to the taxpayer the cost or other basis of the mine. Or it may be an allowance for percentage depletion, computed in accordance with Section 114 (b) (4). But there must be "depletion *allowance* for such property for the taxable year for which the return is made." Otherwise the taxpayer cannot state whether he elects to have the "depletion allowance" computed with or without regard to percentage depletion; the "depletion allowance" for the year cannot be computed in any way, let alone "according to the election thus made"; and the "depletion allowance . . . for such year" cannot be computed without reference to percentage depletion.

The percentage allowance for metal mines is fixed at 15 percentum of the gross income from each property for the taxable year, less rents or royalties paid or incurred. But gross income is only one of two coordinate factors in the computation of percentage depletion. The other is the net income from the mine. The allowance for depletion may

not exceed fifty percentum of the net income computed without allowance for depletion. Thus there can be no allowance for percentage depletion unless there is net as well as gross income. The one is as basic as the other. Without net income, there can be no "depletion allowance" computed with regard to the percentage method. If the taxpayer has exhausted cost depletion, there can be no "depletion allowance" of any kind. And if there can be no "depletion allowance" at all, the Act has no application.

It follows, therefore, that the petitioner's return for 1934 was not the "first return" under the Act. For although it was "in respect of a property" within Section 114 (b) (4), it was not one in which the petitioner could elect to have the "depletion allowance . . . for the taxable year" computed with or without reference to percentage depletion. The petitioner had no election in the taxable year 1934. It had already exhausted its cost depletion, and it could have no percentage depletion because it had no net income for the year without allowance for depletion. Not until the 1935 return did the petitioner have any election. Not until then could it have a "depletion allowance . . . for the taxable year for which the return is made . . .". Then only could the allowance be computed with or without reference to percentage depletion. The 1935 return was the "first return" under the Act. See *Haggar Co.* v. *Helvering*, 308 U. S. 389, where this Court said (p. 395):

> "First return thus means a return for the first year in which the taxpayer *exercises the privilege* of fixing its capital stock value for tax purposes." (Italics supplied).

This interpretation of the Act, we maintain, is the only reasonable one. It attaches meaning to all of the statutory language. Furthermore, this construction accords with the well defined principle that a true election, which Congress clearly intended, presupposes the existence of the right of choice between two alternatives. *Standard Oil Co.* v. *Haw-*

kins, 74 Fed. 395 (C. C. A. 7th); *Patent Royalties Corporation* v. *Commissioner*, 65 F. (2d) 580 (C. C. A. 2d); *McIntosh* v. *Wilkinson*, 36 F. (2d) 807 (D. C. Wis.); *Dexter Sulphite Pulp & Paper Co.* v. *Commissioner*, 23 B. T. A. 227, 235. See also *Snow* v. *Alley*, 156 Mass. 193, 30 N. E. 691, 692; *Allis* v. *Hall*, 76 Conn. 322, 56 Atl. 637, 644.

Finally, the construction we urge not only gives meaning to the entire section, but also carries out the obvious purposes of Congress. The primary purpose was to grant the taxpayer the right to percentage depletion; the secondary purpose, to permit him to make an irrevocable choice between percentage and cost depletion for a particular year and succeeding years. The grant was liberal. The petitioner should not be deprived of a tax benefit which Congress deliberately bestowed on owners of coal, metal and sulphur mines. If there were any doubt as to the meaning of Section 114 (b) (4), it should be read in the light of what Congress was seeking to accomplish—a grant to mine owners of the right to percentage depletion and an election between it and cost depletion. The decision below is clearly contrary to the evident meaning of the act taken as a whole, and should be rejected.

Only the decision below is contrary to our contention. In a carefully reasoned and to our minds conclusive opinion by Judge Goodrich, the Third Circuit made a decision squarely supporting the argument here made. *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436. There, as here, the mine owner had a net loss in 1934 from its mining property, without any allowance for depletion. There, as here, it had no right to cost depletion that year. The Commissioner contended there, as here, that the failure to make an election in the 1934 return precluded percentage depletion in a subsequent year. But the Circuit Court of Appeals for the Third Circuit decided against this contention. Judge Goodrich said:

> ". . . We think it would be an absurd result to construe this statute to require the taxpayer to choose a

method of depletion and to state the method when there is nothing from which to make the deduction.

"Two purposes are clearly evident in the section under consideration. The first is to give to the taxpayer the choice of electing the method of computing its depletion allowance in a particular year. The second is to hold him to that method in succeeding years. The point is that primarily the taxpayer is to have an election as to the computation of its depletion allowance. The second result flows from the first.

• • • • • • • • • •

"Regardless of what may be the situation in higher mathematics, one may not in making an income tax return use the subtrahend of deduction unless he has a minuend of net income from which to subtract it. Since the taxpayer in this case could not have had a deduction in 1934 under either method, it cannot be said to have made an election, which consists of a choice of alternatives. In this election there were no candidates, for there was no original cost, and no profit on which a deduction could be taken. It will be noted that the word 'elects' in the statute is used with reference to 'the depletion allowance for such property for the taxable year.' It seems to us that the common sense effect of this provision is that the choice was to be made at a time when there could be a depletion allowance. *The words 'first return' must be read in the light of these considerations and, so read, we think the reasonable meaning is that the taxpayer must make its choice in the first taxable year in which it could have a depletion allowance under one of the methods of computation.*" (Italics supplied.)

The Board originally tended to support the Commissioner, but it has since changed its views. See *Walter C. Hill*, 41 B. T. A. 245, at 246; *Tonopah Mining Co.* v. *Commissioner*, 44 B. T. A. 165, at 168, aff'd, 127 F. (2d) 239 (C. C. A. 3d). In the latter case, the Board said (168):

"If the petitioner had had no net income for 1934 or 1935 it would not have been incumbent upon it to make an election with regard to percentage depletion for either year."

Riley Investment Co. v. *Commissioner*, 311 U. S. 55, does not touch the issue in this casee. There the taxpayer had a net profit in 1934 and it conceded that it was obliged to state its election of percentage depletion in its 1934 return. It asked to be excepted from the operation of the statute because of its excusable ignorance of the right to use the percentage method. We ask for no exception. We request only that the statute be given its palpable meaning.

B. The administrative construction of Section 114 (b) (4) is entitled to no weight.

Section 114 (b) (4) of the Revenue Act of 1934 is dealt with in the issue here involved in Treasury Regulation 86, Article 23 (m)-5 (*infra*, p. 20). By that Article, the taxpayer is required in his first return for a taxable year beginning after December 31, 1933 to "state as to each property with respect to which the taxpayer has *any item of income or deduction* whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to depletion allowance." (Italics supplied.) The lower court held the regulation to be a reasonable construction of Section 114 (b) (4). We respectfully submit the court erred; first, because the statute is unambiguous and requires no gloss by the Commissioner, and secondly, because the regulation is clearly contrary to the intendment of the Act.

The lower court approached the statute as one which was phrased in general terms and was therefore an appropriate subject for interpretative administrative regulation. *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, 114, was cited as authority for this purpose. We do not, of course, question the decision in the *Reynolds Co.* case; indeed, we believe that the decision shows clearly the difference between statutes which are "general" and those which are not. The Court was there dealing with a section of the Revenue Act (Sec. 22(a), Revenue Act of 1928, c. 852, 45 Stat. 791) which defined gross income as including "gains or profits

and income derived from any source whatever." No one can doubt that such language is indeed "general." On the other hand, as we have shown above, Section 114 (b) (4) is completely specific. Congress made very clear what it meant by the "first return" in which the taxpayer was to state whether he elected cost or percentage depletion. Thus, the interpretation set forth in Article 23 (m)-5 is wholly unnecessary, and, by the same token, wholly ineffective, since it is well settled that administrative construction will be resorted to only in the event that the statute is general and ambiguous. *Louisville & Nashville Ry.* v. *United States*, 282 U. S. 740, 757; *Koshland* v. *Helvering*, 298 U. S. 441, 446; *Biddle* v. *Commissioner*, 302 U. S. 573, 582; *Helvering* v. *Oregon Mutual Life Insurance Co.*, 311 U. S. 267, 272.

Moreover, and an additional reason for ignoring the Article, is that the administrative construction which is embodied in it is patently contrary to the obvious intention of Congress. We have already shown, in Part A, the legislative will as reflected in the statutory language itself. We now consider the external evidence of Congressional intent.

It may not be inappropriate, before we consider this evidence, to point out that the Treasury, of which the Commissioner is part, has demonstrated unmistakable hostility to percentage depletion for mining properties. See *Hearings Before House Committee on Ways and Means on Revenue Revision, 1934*, 73d Cong., 2d Sess., p. 25; *Hearings Before House Committee on Ways and Means on Revenue Revision of 1942*, 77th Cong., 2d Sess., pp. 8-9; *Hearings Before Senate Committee on Finance on H. R. 7378*, 77th Cong., 2d Sess., pp. 5-6 (Revenue Revision, 1942). In view of these efforts to dislodge percentage depletion for mines from the tax laws, it is not surprising that the Treasury has construed Section 114 (b) (4) in an unduly restrictive manner.

There is nothing in the statute itself which justifies the administrative construction. Article 23 (m)-5 of Treasury Regulation 86 is ambiguous. The Commissioner did not

specify whether by "item of income" he meant gross or net income. This by itself is sufficient reason for setting aside the regulation. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 49. But we shall assume for the purposes of this argument that the Commissioner intended "income" to refer to gross income. Had Congress intended to require taxpayers to make their election in the first return which reported gross income, it would have said exactly that. In fact, however, Congress used specific language requiring all taxpayers to state their election in the "first return" in which an election was actually available. In view of the definition of the allowance for percentage depletion and the requirements that the taxpayer shall elect whether "the depletion allowance . . . for the taxable year for which the return is made" should be computed with or without regard to percentage depletion and that "the depletion allowance . . . for such year" shall be computed according to the election thus made, no election between cost and percentage depletion is possible until the taxpayer has net income from the mining property. Not until then can the "depletion allowance" for the year of the "first return" be computed according to the election made. The statute is as simple as that. Nor does this construction involve administrative difficulties, as the lower court seemed to think. Taxpayers who had elected percentage depletion would undoubtedly refer to that year of their election in their returns. See R. 12, 15, 55. In any event, all the respondent need do is to check the depletion taken as against the return of the previous year. See *Tonopah Mining Co.* v. *Commissioner*, 127 F. (2d) 239, at 244 (C. C. A. 3d). In fact, it is established practice for the Commissioner to check the return in the previous year. *Welch* v. *Schweitzer*, 106 F. (2d) 885, 887 (C. C. A. 9th). See Exhibit 5, R. 67-73, especially at 70, 72.

The repeated construction of the nearly identical language in the Revenue Acts of 1936, 1938, and 1940 is wholly

irrelevant. There was no occasion for Congress to correct the administrative construction until the decision in this case. As Judge Learned Hand stated in *F. W. Woolworth Co.* v. *United States*, 91 F. (2d) 973, at 976 (C. C. A. 2d), certiorari denied, 302 U. S. 768, "To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already." No case under Section 114 (b) (4) of the Revenue Act of 1934 reached the courts until January, 1941. The first judicial decision, *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436, *supra*, rightly ignored the restrictive interpretation of the Commissioner in Treasury Regulation 86 and followed the evident intent of Congress. Therefore, there was no need for Congress to deal with this subject until the contrary decision of the court below in February, 1942. See Paul, *Studies in Federal Taxation, Third Series* (1940) 433. When the conflict between the circuits arose, the matter was brought before the Congressional Committees and Congress itself.

In the preparation of the 1942 Revenue Act, Representative Wesley E. Disney, a member of the House Ways and Means Committee, offered an amendment concerning percentage depletion for mines which would permit the taxpayers to make a new election. His amendment and the reasons for it are most significant. The amendment was as follows:

> "The third sentence of section 114 (b) (4) of the Internal Revenue Code is amended by striking out after the word 'chapter' the words 'in respect of a property,' and substituting in lieu thereof the following: 'in which depletion is claimed in respect of a property for a taxable year beginning after December 31, 1941 (whether or not a return in respect of such property was made for any taxable year beginning prior to January 1, 1942)'." (Hearings Before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess., p. 3489).

This language would show unmistakably that the election must be made in the first return in which *depletion is claimed*, i.e., when a claim for depletion is possible due to the existence of net income.

The reason given by Congressman Disney for his amendment is also directly pertinent to the issue in this case:

> "*Many taxpayers have been deprived of the right to take percentage depletion which Congress intended.* This situation has arisen for the following reasons, among others:
>
> • • • • • • • • • •
>
> "(3) Confusion has also arisen in the past as to the proper year for making the election because of uncertainty as to whether an election had to be made on a return which showed no net income from the property. Many taxpayers assumed that the 'first return' from the property was the first one which showed net income and which required a depletion computation, and hence failed to make an election in case the property showed a loss. The Treasury, on the other hand, held that an election must be made whether or not there was net income from the property. By failing to make the election in the year specified by the Treasury, many such taxpayers have been debarred from their right to percentage depletion. *It is believed that the intention of Congress, when the expression 'first return' was used, was to mean the first return on which depletion was claimed. The language of the amendment above suggested clarifies this original intent.*" (*Id.*, Italics supplied).

In the bill introduced by Chairman Doughton of the House Committee on July 14, 1942 (H. R. 7378, 77th Cong., 2d Sess.) it was provided in Section 131 that Section 114 (b) (4) of the previous statute be repealed, and that there should be an outright grant of percentage depletion. In the report accompanying the bill, the Committee explained:

> "For taxable years beginning after December 31, 1941, the depletion deduction for coal, fluorspar, metal, and sulphur mines may be computed (without regard to

any election) either on the percentage basis or on the cost basis, whichever gives the greater deduction." (H. R. No. 2333, 77th Cong., 2d Sess., p. 92).

This provision was retained in the Senate draft (though the number of the section was changed from 131 to 147). The Senate Report (S. Rep. No. 1631, 77th Cong., 2d. Sess., p. 115) contained the same explanation as that given by the House Committee, quoted above. This provision became law on October 21, 1942.

The intention of Congress, had it been doubtful in the statute itself, is now crystal clear. At all times it intended to require the election in the first return under the 1934 Act in which the taxpayer reported net income, and thus had an actual opportunity to state a preference between cost and percentage depletion. Nor can it be argued that by the amendment in the Revenue Bill of 1942, which will preclude the Treasury's construction of Section 114 (b) (4) in the future, Congress has also declared that for prior years the construction in Article 23 (m)-5 is to govern. A precisely similar argument was rejected in *Haggar Co.* v. *Helvering*, 308 U. S. 389, 398-400. *Accord: United States* v. *Hutcheson*, 312 U. S. 219, 235-36.

CONCLUSION.

This case forcefully demonstrates the impropriety, inequity and hardship resulting from the respondent's construction of Section 114 (b) (4) which, if upheld, prevents this taxpayer and others who followed the specific words of the statute from having the benefit of percentage depletion from 1935 to date. The respondent's narrow interpretation of the Act finds no sanction in its language, history or declared purpose.

For the reasons given above, the petitioner submits that the judgment of the lower court should be reversed.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1934, c. 277, 48 Stat. 680.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion * * *

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(b) Basis for Depletion.—

(4) *Percentage Depletion for Coal and Metal Mines and Sulphur.*—The allowance for depletion under section 23(m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of

the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

Regulations 86, promulgated under the Revenue Act of 1934:

ART. 23(m)-5. Computation of depletion based on a percentage of income in the case of coal mines, metal mines, and sulphur mines or deposits.—Under section 114(b)(4) a taxpayer may deduct for depletion an amount equal to 5 per cent of the gross income from the property during the taxable year in the case of coal mines, an amount equal to 15 per cent of the gross income from the property during the taxable year in the case of metal mines, and an amount equal to 23 per cent of the gross income from the property during the taxable year in the case of sulphur mines or deposits, but such deduction shall not in any case exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. (For definitions of "gross income from the property" and "net income of the taxpayer (computed without allowance for depletion) from the property," see article 23(m)-1 (g) and (h).)

In his first return made under Title I of the Act (for a taxable year beginning after December 31, 1933) the taxpayer must state as to each property with respect to which the taxpayer has any item of income or deduction whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to percentage depletion. An election once exercised under section 114(b)(4) and this article can not thereafter be changed by the taxpayer, and the depletion allowance in respect of each such property will for all succeeding taxable years be computed in accordance with the election so made. If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion. The method, determined under section 114(b)

(4) and this article, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

Revenue Act of 1932, c. 209, 47 Stat. 169.

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(b) Basis for Depletion—

(4) *Percentage Depletion for Coal and Metal Mines and Sulphur.*—The allowance for depletion shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance for the taxable year 1932 or 1933 be less than it would be if computed without reference to this paragraph. A taxpayer making return for the taxable year 1933 shall state in such return, as to each property (or, if he first makes return in respect of a property for any taxable year after the taxable year 1933, then in such first return), whether he elects to have the depletion allowance for such property for succeeding taxable years computed with or without reference to percentage depletion. The depletion allowance in respect of such property for all succeeding taxable years shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for succeeding taxable years shall be computed without reference to percentage depletion.

Regulations 77, promulgated under the Revenue Act of 1932:

ART. 225. Computation of depletion based on a percentage of income in the case of coal mines, metal mines, and sulphur mines or deposits.—

* * *

In the return for the taxable year 1933 the taxpayer must state as to each property whether he elects to have the depletion allowance for each property for 1934 and succeeding taxable years computed with or without reference to percentage depletion. In the case of any property in respect of which a return is first made by the taxpayer in a year subsequent to 1933, the taxpayer must state as to each property whether he elects to have the depletion allowance for succeeding taxable years computed with or without reference to percentage depletion. An election once exercised under section 114(b)(4) and this article can not thereafter be changed by the taxpayer, and the depletion allowance in respect of each such property will for all succeeding taxable years be computed in accordance with the election so made. If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion.

No. ~~1249~~ 94

In the Supreme Court of the United States

OCTOBER TERM, 1941

MOTHER LODE COALITION MINES COMPANY,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–20), is reported in 42 B. T. A. 596. The opinion of the circuit court of appeals (R. 85–90) is reported in 125 F. (2d) 657.

JURISDICTION

The judgment of the circuit court of appeals was entered February 21, 1942. (R. 90–91.) The petition for a writ of certiorari was filed May 19, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an income tax return for 1934 which reports gross income but no net income from a mining property is "the first return" made by the taxpayer under the Revenue Act of 1934 "in respect of" such property within the meaning of Section 114 (b) (4) of that Act.

2. Whether a taxpayer which in its 1932 income tax return elected under Section 114 (b) (4) of the Revenue Act of 1932 to take percentage depletion, may take percentage depletion for the year 1935 under Section 114 (b) (2) of the Revenue Act of 1934 without making a new election under the later statute.

STATUTES AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 8–20.

STATEMENT

The taxpayer is a corporation operating a metal mining property near Kennecott, Alaska (R. 12). During the years prior to 1933, taxpayer had taken deductions on account of depletion which exhausted its cost basis (R. 12, 44). In its income tax return for 1933 it stated (R. 12–13):

> Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932 the taxpayer elects to deduct depletion on the percentage basis for the year 1933 and thereafter.

In 1934 taxpayer did not extract ore from its property but it did sell ore mined in previous years

(R. 12). In its income tax return for that year it reported total income of $27,865.12 and total deductions of $66,763.38 (R. 13). Taxpayer did not claim any deductions for depletion and did not state when it filed its 1934 return whether it elected to take percentage depletion under Section 114 (b) (4) of the Revenue Act of 1934 for the taxable year 1934 and thereafter (R. 13, 14).

In 1935 the taxpayer mined its properties and derived a net profit from the operation (R. 12). In its return for 1935 it claimed a deduction of $25,276.88 for percentage depletion, stating in support of the claim (R. 12):

> Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932 the taxpayer elected to deduct depletion on the percentage basis for the year 1933 and thereafter.

The Commissioner disallowed the percentage depletion deduction for 1935, ruling that Section 114 (b) (4) of the Revenue Act of 1934 required a new election of the basis for computing depletion in respect of a property to be made in the first return filed by the taxpayer under that Act in respect of such property and that the taxpayer's failure to make an affirmative election in its 1934 return constituted an election to compute depletion thereafter without reference to percentage depletion (R. 14–15).

The taxpayer appealed to the Board of Tax Appeals. The Board found the facts above stated

(R. 11–15) and approved the Commissioner's determination of a deficiency based upon disallowance of the deduction (R. 20). The taxpayer then appealed to the Circuit Court of Appeals for the Second Circuit. The court held that the taxpayer's 1934 return was its first return under the Revenue Act of 1934 in respect of the property, regardless of whether it reported net income, and that, having failed to make an affirmative election to take percentage depletion in its return for 1934, the taxpayer could not make such an election in its return for 1935. The court also held that the election stated in taxpayer's 1933 return was not sufficient for subsequent years because Section 114 (b) (4) of the Revenue Act of 1934 required a new election to be made in the first return filed under that Act. Accordingly, the court affirmed the decision of the Board of Tax Appeals (R. 90–91).

ARGUMENT

1. The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436, upon the question whether the election made in the 1935 return entitled taxpayer to percentage depletion notwithstanding its failure to make such an election in its 1934 return. Both courts have recognized the conflict. See R. 90; *Tonopah Mining Co.* v. *Commissioner* (C. C. A. 3d), decided March 17, 1942, not

yet officially reported but found in 1942 C. C. H., p. 9782. Accordingly, although we believe the decision below to be correct, we do not oppose the granting of certiorari with respect to this issue.

2. Taxpayer argues as a second contention that the election to take percentage depletion made in its 1933 return constituted a valid election for all subsequent years and thus complied with Section 114 (b) (4) of the Revenue Act of 1934 (Pet. 6–7). The argument has no merit. Section 114 (b) expressly provides that:

> A taxpayer making his first return under this title [Title I] in respect of a property shall state whether he elects to have the depletion allowance * * * computed with or without regard to percentage depletion * * *. If the taxpayer fails to make such statement in the return, the depletion allowance * * * shall be computed without reference to percentage depletion. * * *

As the court below stated, these words are quite explicit. An income tax return for 1933 is not the first return under Title I of the Revenue Act of 1934.

In spite of the plain words of the statute requiring all taxpayers to state an election in their first return under the 1934 Act, taxpayer relies upon the Committee reports explaining that Section 114 (b) (4) "permitted" taxpayers to make a new election in order to avoid "administrative complexities." H. Rep. No. 704, 73d Cong., 2d Sess., p. 29;

S. Rep. No. 558, 73d Cong., 2d Sess., p. 36. It argues from that language that a new election was not required if the taxpayer had already elected to take percentage depletion. But, apparently, the complexities to which the Committees referred were those of checking the elections made in 1933 and this consideration would apply to previous statements of an election to take percentage depletion just as much as to failures so to elect. Hence it seems that all that was intended by use of the permissive was to indicate that a taxpayer might state an election to take percentage depletion or else remain silent and have his deduction for depletion calculated on a cost basis.[1] But whatever the explanation, the inference which taxpayer would draw is too tenuous to warrant interpolating an exception into the plain words of the statute to cover the case of those who made an election under the 1932 Act.

There is no necessary connection between this second question and the first question presented. There is no conflict of decisions upon this second question nor is there any indication that it has any present importance in the administration of the revenue acts. Accordingly, we submit that if certiorari is granted, the writ should be limited to

[1] Section 114 (b) (4) of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code make binding for the future the first election made under one of those acts but not an election made under the Revenue Act of 1932. Thus, they differ somewhat from the Revenue Act of 1934.

the first question presented and that as to this second question the petition should be denied.

Respectfully submitted.

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JUNE 1942.

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APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the

absence of such provisions, on the basis of the trust income allocable to each. (For percentage depletion allowable under this subsection, see section 114 (b), (3) and (4).)

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The Basis of property shall be the cost of such property; except that—

(1) *Inventory value.*—If the property should have been included in the last inventory, the basis shall be the last inventory value thereof.

* * * * *

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other dis-

position of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(4) *Percentage depletion for coal and metal mines and sulphur.*—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his *first return* under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer,

either directly or through one or more substituted bases, as defined in that section. [Italics supplied.]

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sections 23 (l) and (m), 113 (a) (1), and 114 (b) (1) of the Revenue Act of 1932 are either identical or substantially so, with Sections 23 (m) and (n), 113 (a) (1) and (b) (1), and 114 (b) (1) of the Revenue Act of 1934, and for that reason are not set out *haec verba* herein. There are, however, substantial differences between Section 114 (b) (4) of the Revenue Act of 1932 and Section 114 (b) (4) of the Revenue Act of 1934. Section 114 (b) (4) of the Revenue Act of 1932 is therefore set out in full, and is as follows:

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

* * * * *

(4) *Percentage depletion for coal and metal mines and sulphur.*—The allowance for depletion shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance for the taxable year 1932 or 1933 be less than it would be if computed without

reference to this paragraph. A taxpayer making return for the taxable year 1933 shall state in such return, as to each property (or, if he first makes return in respect of a property for any taxable year after the taxable year 1933, then in such first return), whether he elects to have the depletion allowance for such property for succeeding taxable years computed with or without reference to percentage depletion. The depletion allowance in respect of such property for all succeeding taxable years shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for succeeding taxable years shall be computed without reference to percentage depletion. During the period for which property acquired after December 31, 1933, is held by the taxpayer—

(A) if the basis of the property in the hands of the taxpayer is, under section 113 (a), determined by reference to the basis in the hands of the transferor, donor, or grantor, then the depletion allowance in respect of the property shall be computed with or without reference to percentage depletion, according to the method of computation which would have been applicable if the transferor, donor, or grantor had continued to hold the property, or

(B) if the basis of the property is, under section 113 (a), determined by reference to the basis of other property previously held by the taxpayer, then the depletion allowance in respect of the property shall be computed with or without reference to percentage depletion, according to the method of computation which would have been applicable in

respect of the property previously held if the taxpayer had continued to hold such property.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 23 (m)–1. *Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.*—Section 23 (m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under these provisions of the Act the owner of an interest in mineral deposits, mineral properties, or timber, whether freehold or leasehold, is allowed annual depletion and depreciation deductions which, in the aggregate, will return to him the cost or other basis of such property as provided in section 113, plus, in either case, subsequent allowable capital additions (see articles 23 (m)–15 and 23 (m)–16) with the following exceptions and qualifications:

* * * * *

(2) In the case of coal mines, metal mines, and sulphur mines or deposits the aggregate annual allowable deductions may never be as great as the cost or other basis, if an election of the percentage depletion method is made in his first return under Title I of the Act; and

* * * * *

When used in these articles (23m)-1 to 23 (m)-28) covering depletion and depreciation—

* * * * *

(*g*) "Gross income from the property" as used in section 114 (b) (3) and (4) and articles 23 (m)-1 to 23 (m)-28, inclusive, means the amount for which the taxpayer sells (a) the crude mineral product of the property or (b) the product derived therefrom, not to exceed in the case of (a) the representative market or field price (as of the date of sale) of crude mineral product of like kind and grade before transportation from the immediate vicinity of the mine or well, or in the case of (b) the representative market or field price (as of the date of sale) of a product of the kind and grade from which the product sold was derived, before the application of any processes (to which the crude mineral product may have been subjected after emerging from the mine or well) with the exception of those listed below, and before transportation from the place where the last of the processes listed below was applied. If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes minus the costs (including transportation costs) of the processes not listed below. The processes excepted are as follows:

(1) In the case of coal—cleaning, breaking, sizing, and loading at the mine for shipment;

(2) In the case of sulphur—pumping to vats, cooling, breaking, and loading at the mine for shipment;

(3) In the case of iron ore and ores which are customarily sold in the form of the crude mineral product—sorting or concentrating to bring to shipping grade, and loading at the mine for shipment; and

(4) In the case of lead, zinc, copper, gold, or silver ores and ores which are not customarily sold in the form of the crude mineral product—crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other) than crushing and concentrating (by gravity or flotation).

In all cases there shall be excluded in determining the "gross income from the property" an amount equal to any rents or royalties which were paid or incurred by the taxpayer in respect of the property and are not otherwise excluded from the "gross income from the property." If royalties in the form of bonus payments or advanced royalties (see article 23 (m)–10) have been paid in respect of the property in the taxable year or in prior years, the amount excluded from "gross income from the property" for the taxable year on account of such payments shall be an amount equal to that part of such payments which is allocable to the products sold during the taxable year.

(*h*) "Net income of the taxpayer (computed without allowance for depletion) from the property," as used in section 114 (b) (2), (3), and (4) and articles 23 (m)–1 to 23 (m)–28, inclusive, means the "gross income from the property" as defined in paragraph (*g*) less the allowable deductions attribut-

able to the mineral property upon which the depletion is claimed and the allowable deductions attributable to the processes listed in paragraph (*g*) in so far as they relate to the product of such property, including overhead and operating expenses, development costs properly charged to expense, depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. Deductions not directly attributable to particular properties or processes shall be fairly allocated. To illustrate: In cases where the taxpayer engages in activities in addition to mineral extraction and to the processes listed in paragraph (*g*), deductions for depreciation, taxes, general expenses, and overhead, which can not be directly attributed to any specific activity, shall be fairly apportioned between (1) the mineral extraction and the processes listed in paragraph (*g*) and (2) the additional activities, taking into account the ratio which the operating expenses directly attributable to the mineral extraction and the processes listed in paragraph (*g*) bear to the operating expenses directly attributable to the additional activities. If more than one mineral property is involved, the deductions apportioned to the mineral extraction and the processes listed in paragraph (*g*) shall, in turn, be fairly apportioned to the several properties, taking into account their relative production.

* * * * *

ART. 23. (m)–5. *Computation of depletion based on a percentage of income in the case of coal mines, metal mines, and sulphur mines or deposits.*—Under section 114 (b) (4) a taxpayer may deduct for depletion an amount equal to 5 per cent of the gross income from the property during the taxable

year in the case of coal mines, an amount equal to 15 per cent of the gross income from the property during the taxable year in the case of metal mines, and an amount equal to 23 per cent of the gross income from the property during the taxable year in the case of sulphur mines or deposits, but such deduction shall not in any case exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. (For definitions of "gross income from the property" and "net income of the taxpayer (computed without allowance for depletion from the property," see article 23 (m)-1 (*g*) and (*h*).)

In his first return made under Title I of the Act (for a taxable year beginning after December 31, 1933) the taxpayer must state as to each property with respect to which the taxpayer has any item of income or deduction whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to percentage depletion. An election once exercised under section 114 (b) (4) and this article can not thereafter be changed by the taxpayer, and the depletion allowance in respect of each such property will for all succeeding taxable years be computed in accordance with the election so made. If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion. The method, determined under section 114 (b) (4) and this article, of computing the depletion allowance shall be applied in the case of the property for all

taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

ART. 114–1. *Basis for allowance of depreciation and depletion.*—The basis upon which exhaustion, wear and tear, obsolescence, and depletion will be allowed in respect of any property is the same as is provided in section 113 (a), adjusted as provided in section 113 (b), for the purpose of determining the gain from the sale or other disposition of such property, except as provided in article 23 (m)–3, relating to depletion based on discovery value, in article 23 (m)–4, relating to percentage depletion in the case of oil and gas wells, and in article 23 (m)–5, relating to percentage depletion in the case of coal mines, metal mines, and sulphur mines or deposits.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

Articles 221 (g) and (h) and 611, promulgated under the Revenue Act of 1932, are identical or substantially so, with Articles 23 (m)–1 (2) and (g) and (h) and 114–1 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, and are for that reason not set out herein. There are, however, substantial differences between Article 225 of Treasury Regulations 77 and the corresponding Article 23 (m)–5, of Treasury Regulations 86. Article 225 of Treasury Regulations 77, is therefore set out in full, and is as follows:

ART. 225. *Computation of depletion based on a percentage of income in the case of coal mines, metal mines, and sulphur mines or deposits.*—Under section 114 (b) (4) a taxpayer may deduct for depletion an amount equal to 5 per cent of the gross income from the property during the taxable year in the case of coal mines, an amount equal to 15 per cent of the gross income from the property during the taxable year in the case of metal mines, and an amount equal to 23 per cent of the gross income from the property during the taxable year in the case of sulphur mines or deposits, but such deduction shall not in any case exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. (For definitions of "gross income from the property" and "net income of the taxpayer (computed without allowance for depletion) from the property," see article 221 (g) and (h).) For the taxable years 1932 and 1933 the deduction computed under this article shall not be less than it would be if computed upon the cost or other basis provided in section 113 and articles 591–606.

In the return for the taxable year 1933 the taxpayer must state as to each property whether he elects to have the depletion allowance for each property for 1934 and succeeding taxable years computed with or without reference to percentage depletion. In the case of any property in respect of which a return is first made by the taxpayer in a year subsequent to 1933, the taxpayer must state as to each property whether he elects to have the depletion allowance for succeeding taxable years computed with or without ref-

erence to percentage depletion. An election once exercised under section 114 (b) (4) and this article can not thereafter be changed by the taxpayer, and the depletion allowance in respect of each such property will for all succeeding taxable years be computed in accordance with the election so made. If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion. No right of election exists, however, in the case of property acquired by the taxpayer after December 31, 1933, (1) if the basis of the property in the hands of the taxpayer is determined under section 113 (a) by reference to the basis in the hands of the transferor, donor, or grantor, or (2) if the basis of the property is determined under section 113 (a) by reference to the basis of other property previously held by the taxpayer. In such cases the depletion allowance in respect of the property will be computed with or without reference to percentage depletion, in cases falling under (1) according to the method of computation which would have been applicable if the transferor, donor, or grantor had continued to hold the property, or in cases falling under (2) according to the method of computation which would have been applicable in respect of the property previously held if the taxpayer had continued to hold such property.

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FILE COPY

No. 94

In the Supreme Court of the United States

OCTOBER TERM, 1942

MOTHER LODE COALITION MINES COMPANY,
PETITIONER,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–20), is reported in 42 B. T. A. 596. The opinion of the circuit court of appeals (R. 85–90) is reported in 125 F. (2d) 657.

JURISDICTION

The judgment of the circuit court of appeals was entered February 21, 1942 (R. 90–91). The petition for a writ of certiorari was filed May 19, 1942, and granted June 8, 1942. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether its income tax return for 1934 reporting gross income but no net income from a mining property was the "first return" made by petitioner under the Revenue Act of 1934 "in respect of" such "property" within the meaning of Section 114 (b) (4) of that Act.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 21–29.

STATEMENT

Petitioner is a corporation operating a metal mining property near Kennecott, Alaska (R. 12). During the years prior to 1933 petitioner had taken deductions on account of depletion which exhausted its cost basis (R. 12, 44). In its income tax return for 1933 it elected "to deduct depletion on the percentage basis for the year 1933 and thereafter" (R. 12). This election was made in accordance with Section 114 (b) (4) of the Revenue Act of 1932 which, for the first time, allowed mining companies to take depletion deductions either for a portion of the cost of the property or for a percentage of the gross income.

The Revenue Act of 1934, applicable to the taxable year here involved, again gave mining com-

panies this election, and provided that the election for 1934 and ensuing years should be made in the following manner (Section 114 (b) (4)):

> A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer * * *.

Petitioner filed an income-tax return for 1934 and did not state that it elected to take percentage depletion (R. 14). It did report a total income of $27,865.12 (R. 13) which arose from the sale of ore mined the previous year (R. 12, 13). It also reported total deductions of $66,763.38, most of which were due to "Shutdown Expense" (R. 13)—during 1934 petitioner had not extracted ore from the property (R. 12). Consequently, this return showed a net loss and petitioner did not claim any deduction for depletion.

In 1935 petitioner mined its properties and derived a net profit from the operation (R. 12). In its return for 1935 it claimed a deduction of $25,276.88 for percentage depletion, stating in support of the claim (R. 12):

> Under the provisions of Section 114 (b) (4) of the Revenue Act of 1932 the taxpayer elected to deduct depletion on the percentage basis for the year 1933 and thereafter.

The Commissioner disallowed the percentage depletion deduction for 1935, ruling that under Section 114 (b) (4) of the Revenue Act of 1934 petitioner's failure to make an affirmative election in its 1934 return constituted an election to compute depletion thereafter without reference to percentage depletion (R. 14–15).

Petitioner appealed to the Board of Tax Appeals. The Board found the facts above stated (R. 11–15) and approved the Commissioner's determination of a deficiency based upon disallowance of the deduction (R. 20). Petitioner then appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the Board (R. 90). The court held that petitioner's 1934 return was its first return under the Revenue Act of 1934 in respect of the property, regardless of whether it had reported net income, and that the petitioner, having failed to make an affirmative election to take percentage depletion in its return for 1934, could not make such an election in its return for 1935.

On June 8, 1942, this Court granted certiorari limited to this issue,[1] on which the decision below was in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436.

SUMMARY OF ARGUMENT

Section 114 (b) (4) of the Revenue Act of 1934 provided that a taxpayer making its "first return" under the income tax title of that Act "in respect of" a property, should state whether he elected the cost or percentage method of computing depletion allowances for that year and for all future years. It also provided that if no election were stated, the allowances should then and thereafter be computed without reference to the percentage method. Petitioner's income tax return for 1934 was its first return made under the income tax title of the Revenue Act of 1934. It was also a return "in respect of" the property for it included items of gross income arising from the sale of ore mined at the property in prior years and items of deduction incurred at the property in 1934. In its 1934 return petitioner did not elect to compute depletion on the percentage method. Therefore, the

[1] The court below also held that the election stated in the taxpayer's 1933 return was not sufficient for subsequent years because Section 114 (b) (4) of the Revenue Act of 1934 required a new election to be made in the first return filed under that Act (R. 86–88). Taxpayer challenged this holding in its petition for certiorari but in granting the writ this Court excluded further argument on the point.

Commissioner was required by the plain words of the statute to require any future deduction for depletion to be computed without reference to the percentage method.

The applicable Treasury regulation is equally explicit. It defines a return made in respect of a property as one showing any item of income or deduction with respect to a property. Petitioner's return showed income from ore mined at the property in previous years and deductions for expenditures incurred in 1934 with respect to maintenance of the property. Therefore, the return was the first return "in respect of" the property and petitioner was required to state its election at that time, regardless of whether it had a net income.

In following the plain meaning of the words and applying the governing Treasury regulation the court below made effective the only fair and practicable interpretation of Section 114 (b) (4). To interpolate any further qualification such as the one petitioner suggests would be unfair as between taxpayers by giving some an opportunity to postpone their decision later than their competitors. It would also be unworkable because neither the Commissioner nor the taxpayer could identify the return in which the election should be made until it was ascertained, perhaps years later after protracted litigation, whether or not the taxpayer in 1934 had had net income.

ARGUMENT

PETITIONER'S INCOME TAX RETURN FOR 1934 WAS THE "FIRST RETURN" MADE BY TAXPAYER UNDER THE REVENUE ACT OF 1934 "IN RESPECT OF" ITS MINING PROPERTY

Section 114 (b) (4) of the Revenue Act of 1934 (pp. 22–23, *infra*) set forth in detailed and explicit terms the manner in which mining companies should elect whether to take depletion for all subsequent years on a cost or a percentage basis. The section required that "a taxpayer making his first return under this [the income tax] title in respect of a property" should state which basis he selected, and it provided that the allowance should be calculated in accordance with the election stated. It will be observed that what was required to be stated was the choice of a *method* of computing the allowance.

Section 114 (b) (4) also covered the case of those who did not expressly state an election; it provided that "If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion." The next sentence made binding for subsequent years the election made for 1934: "The method, determined as above, of computing the depletion allowance shall be applied in the case of

the property for all taxable years in which it is in the hands of such taxpayer * * *."[2]

Although depletion allowances are normally made to permit owners of wasting property to recover their cost (*Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 366–367), these provisions for percentage depletion created a specially privileged class of taxpayers who continued to receive depletion allowances after one hundred percent of their cost had been recovered.[3] The petitioner had exhausted its cost basis and if it desired to bring itself within the privileged class the burden was upon it to do so by stating its election in its first income tax return made under the Revenue Act of 1934 in respect of its property. For this liberal offer of legislative grace is to be strictly construed and limited to those who meet the statutory terms. Cf. *Riley Co.* v. *Commissioner*, 311 U. S. 55. See also *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440; *White* v. *United States*, 305 U. S. 281, 284; *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49.

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[2] Section 114 (b) (4) of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code gave continuing effect to this provision. The Revenue Act of 1942 permits the taxpayer to take either cost or percentage depletion, whichever is greater, without regard to any previous election. Public Law 753, 77th Cong., 2d Sess., approved October 21, 1942.

[3] See the Statement of Secretary Morgenthau, Hearings before the Committee on Ways and Means, House of Representatives, on Revenue Revisions of 1942, 77th Cong., 2d Sess., pp. 8–9, recommending the abolition of this "special privilege."

In the instant case petitioner failed to meet the terms of the offer. It filed an income tax return for 1934 showing gross income from ore mined in previous years at the property and claiming deductions on account of such items as "Shutdown Expense" at the property, but it did not state in the return that it elected to take percentage depletion. Under the statutory language quoted above it was bound to do so, for the 1934 return was petitioner's "first return" made under the income tax title of the Revenue Act of 1934 "in respect of" the property on account of which it now claims the depletion allowance.

Certainly, the 1934 return was the "first return." Petitioner had not previously filed a return under that title, and did file this return under that title.

It is equally clear that petitioner's 1934 return was filed "in respect of" the property. During 1934 petitioner sold ores which it had mined in prior years from the property in question. The 1934 return, made upon the inventory basis of accounting, showed a gross profit of $27,690.36 from the sale of these ores (R. 13). This profit was "gross income from the property" even though there was no production for the year (*Herring* v. *Commissioner*, 293 U. S. 322). Interest and rents received increased the taxpayer's total income to $27,865.12 (R. 13). The deductions aggregated $66,763.38 (R. 13). They included an item of $41,369.94 listed as "Shutdown Expense," all or a

part of which was incurred in respect of the property (R. 12, 13). There was a net loss of $38,898.26 (R. 13). But whatever the net result, the return, which included these items of income produced by the mine, together with the offsetting items of deductions from the same source, was plainly made "in respect of" that "property."

Finally, petitioner could have stated in the 1934 return whether it elected to have its depletion allowance computed according to the cost or the percentage method. Both methods would have resulted in an allowance of zero but that could not be known until the computation was made; the statement could have been made and it would have served a reasonable purpose (see pp. 15–19 *infra*).

For these reasons, under the plain words of the statute, taxpayer's 1934 return falls within the statutory description, and its failure then to state its election foreclosed any subsequent claim to percentage depletion.

Likewise, Article 23 (m)–5 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, makes plain that petitioner was bound to state in its 1934 return any election which it wished to make to take depletion deductions for future years on the percentage basis. Article 23 (m)–5 provides:

> In his first return made under Title I of the Act (for a taxable year beginning after December 31, 1933) the taxpayer must state *as to each property with respect to which*

> *the taxpayer has any item of income or deduction* whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to percentage depletion. * * * *If the taxpayer fails to make* such statement in the return in which the election should be so indicated, *the depletion allowance* for the year for which an election must be first exercised and for all succeeding taxable years *will be computed without reference to percentage depletion.* * * * [Italics supplied.]

Petitioner's 1934 income tax return covered its first taxable year beginning after December 31, 1933. It had items both of income and of deduction with respect to the property. Its silence left Commissioner no alternative except to compute the deductions for subsequent years without reference to percentage depletion.

The regulation is binding if valid. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90; *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326. And it is plainly valid; for if the words of Section 114 (b) (4) do not compel the rule expressed in it, then they are an appropriate subject for an interpretative regulation. Cf. *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326; *Magruder* v. *Washington, Baltimore & Annapolis R. Corp.*, 316 U. S. 69. Article 23 (m)–5 gives the words a reasonable interpretation which, as we shall show below, is fair and practical in its operation. Moreover,

since its promulgation the statutory language has several times been reenacted, thus reinforcing its validity. *Morrissey* v. *Commissioner*, 296 U. S. 344, 355. Cf. *Morgan* v. *Commissioner*, 309 U. S. 78, 81; *Old Mission Co.* v. *Helvering*, 293 U. S. 289, 293, 294; *Helvering* v. *Winmill*, 305 U. S. 79, 83. The remarks of Representative Disney quoted by petitioner (Br. 16) do not detract from the force of the successive reenactments. The committee rejected his amendment which would have written the petitioner's interpretation into the statute with the explanation that the amendment clarified the original intent. Consequently, if any inference may be drawn from the event, it is that Representative Disney's interpretation of the original intent was erroneous.[4]

In the face of the language of the statute and of the applicable Treasury regulations, petitioner seeks to enlarge the special privilege created by Section 114 (b) (4) to permit taxpayers to make the election in a second income tax return filed in respect of a property wherever the first return correctly shows that the taxpayer had no net income. The petitioner's argument for that result is as follows: The statute requires the taxpayer to state in its first return whether it elects to have "the depletion allowance for such property for the taxable year for which the return is made com-

[4] The changes made in Section 114, and the House and Senate reports explaining them, are manifestly irrelevant. See p. 8, n. 2, *supra*.

puted with or without regard to percentage depletion" and then provides that "the depletion allowance * * * shall be computed according to the election thus made"; therefore, petitioner says (Br. 9), "the first return" must be "one in which the petitioner could elect to have the 'depletion allowance * * * for the taxable year' computed with or without reference to percentage depletion"; and, petitioner continues, in its 1934 return the petitioner could not so elect because it had no net income.

The argument is manifestly fallacious; and the fault lies in the final step. Petitioner could have elected in 1934 whether to have the depletion allowance for 1934 "computed with or without regard to percentage depletion," and the computation of the allowance could have been made according to the method thus chosen. It so happened that either method of making the computation would result in no allowance, so that the choice had no significance for that year, but that could not be known until the computation was completed. Other taxpayers might be able to take a deduction according to one method and not the other, or according to either method. Often the result could not be known until, first, the method had been selected and, second, the computation had been made. But every taxpayer, regardless of his situation, could choose one or the other method of making the computation, even though he might take no deduction. This is all that the statute re-

quires and the Treasury interpretation gives full scope and meaning to every word in it. Conversely, there is nothing in the statute which even suggests that the election of a method of computation was not to be made until the computation would result in an actual deduction. The choice to be made was between *methods* of computation.[5]

[5] As pointed out in the text the Treasury interpretation gives effect to every word in Section 114 (b) (4) and, as we shall show, it is reasonable. (See pp. 15–19, *infra*.) Petitioner's arguments, when exposed, go only to contend that Section 114 (b) (4) should be interpreted to speak of an election between two actual deductions, or between an actual deduction and no deduction. At most, they would show that there is a reasonable interpretation other than that which the Treasury adopted. But this, it is settled, is not enough to overthrow the Treasury regulation.

In fact, however, analysis of petitioner's argument and of *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436 (C. C. A. 3), shows the weakness of the view which they advance. Petitioner argues (Br. 4, 7–8) that the first return is "the first in which the taxpayer has an election between cost and percentage depletion." But after its decision in the *Pittston-Duryea* case, the Circuit Court of Appeals for the Third Circuit itself recognized this argument was often unsound. In *Tonapah Mining Co.* v. *Commissioner*, 127 F. (2d) 239 (C. C. A. 3), the taxpayer had exhausted its cost basis before 1934 and therefore in that year could not have elected between deductions on the cost or percentage basis. Nevertheless, the court held that the taxpayer was not excused from stating its election in its 1934 return.

Petitioner also argues (Br. 10–11), adopting the view of the Circuit Court of Appeals for the Third Circuit, that Congress cannot have intended to require a taxpayer to make a choice at a time when there could be no depletion allowance; there could be no allowance, the court said, unless there was net income; "one may not in making an income

In addition to being a reasonable interpretation of the words, the Treasury regulation gives effect to two fundamental purposes of Section 114 (b) (4), which cannot be accomplished under petitioner's interpretation. First, Section 114 (b) (4) aims to put all taxpayers on an equal basis in choosing a program for depletion by requiring each to make its election concurrently with its competitors. Second, the Commissioner's interpretation will simplify administrative procedure and avoid the administrative confusion which, it is demonstrable, would follow from acceptance of the petitioner's interpretation.

First: The purpose of Section 114 (b) (4) was to give taxpayers an opportunity to elect not a depletion deduction but a depletion program. Al-

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tax return use the subtrahend of deduction unless he has a minuend of net income from which to subtract it." *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. (2d) 436, 438. The fallacy of this argument is pointed out by the court below (R. 89); it does not meet the case of a taxpayer who had no net income in 1934 and no right to percentage depletion but who did have gross income and a depletable cost. Even under petitioner's view, a taxpayer in that position would have been able to take a depletion deduction and would therefore have been put to its election in 1934. In such a case the existence of net income is immaterial, for the depletion deduction is not subtracted from net income but from gross income; provision is made for it, as for most other deductions, in Section 23 of the Revenue Acts and no one of these permitted deductions is any more or less available than the others even though a part of them may exceed the gross income.

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though the initial sentences are cast in terms of electing a method for computing a current deduction, other provisions make the choice binding in subsequent years. As a result, a taxpayer making a return for 1934 ordinarily would be concerned less with making a mathematical computation to determine the largest deduction for that year than with selecting the method of computing depletion. A taxpayer planning large capital expenditures in the hope of securing modest earnings might elect to use the cost basis even though it could secure a larger deduction for 1934 by using the percentage method. In the case of other taxpayers the converse situation doubtless existed. The point to be emphasized is that the election provided for by Section 114 (b) (4) had more future than current importance.

In view of that circumstance there is little reason to suppose that Congress considered it at all important whether a taxpayer could make a return for 1934 showing no net income without making a claim for a depletion deduction. To have made that fact decisive would have been grossly unfair to other companies for it would have given companies situated as petitioner an additional year in which to study conditions, make plans, and form a conclusion as to how to secure a tax advantage. Consequently, it is far more reasonable to suppose that Congress intended to treat all taxpayers alike and to require all who were making returns in 1934 in any way relating to a mining property

to choose at that time their depletion programs.*

Second: The petitioner has not stated precisely what interpretation it would place upon Section 114 (b) (4) but has left it uncertain whether the actual existence of net income before a depletion deduction is to be decisive or whether the critical fact is to be what is shown on the face of the original return. We assume that petitioner prefers the former alternative, which was adopted by the Circuit Court of Appeals for the Third Circuit. *Kehoe-Berge Coal Mining Co.* v. *Commissioner,* 117 F. (2d) 439. The latter would make the obligation to state an election dependent, at least in part, on the errors of the taxpayer, a consequence which Congress surely did not intend.

But the view adopted in the *Kehoe-Berge* case is unsound in practice. Under that interpretation, whether a taxpayer was put to its election in its 1934 return or could make the election later, could not be known until a final determination was made some years later, perhaps after protracted litigation concerning whether or not the taxpayer in 1934 had net income. Such a result would be unfair to taxpayers and to the Government.

* Petitioner argued in the court below that a farmer making a return in respect of his farm property in 1934 should not be obliged to elect how to compute depletion in order to be able to take depletion on a percentage basis in future years in the event that minerals are discovered on the property. The example is not in point. The reason the farmer would not be required to state the election is that his 1934 return was not made in respect of a mining property and not that there was no net income from mining operations.

Under this interpretation many taxpayers would not know until too late whether or not they were required to state an election in the 1934 return. For example, in the *Kehoe-Berge* case the 1934 return erroneously showed no net income and the taxpayer did not state its election to take percentage depletion until 1935 when the taxpayer had net income. Had the 1934 return been correct, as the taxpayer doubtless believed it to be, its election made in the 1935 return would have been adequate under petitioner's theory; but since it later developed that taxpayer had net income for 1934 the claim of percentage depletion made for 1935 came too late.

Such a result also would be administratively unworkable, as a simple example will make clear. Let us suppose that a taxpayer makes a 1934 return showing a net loss, in which it takes no deduction for depletion and makes no election. Later, the Commissioner assesses a deficiency, contending that certain income not returned was taxable; the taxpayer disputes his ruling and litigation follows. Until that litigation was finally decided, neither the taxpaper nor the Bureau of Internal Revenue could tell whether the taxpayer was put to an election in 1934, and by silence had bound itself to the cost method, or whether it could make the election in a later year. Meanwhile, the taxpayer could not intelligently plan its operations or know its financial condition, and the Bureau would be compelled to keep open all the

returns for subsequent years in order to check the later depletion deductions.[7]

To this confusion is to be compared the simple administrative procedure possible under the Treasury interpretation. As the court below said, after discussing the problems illustrated by the *Kehoe-Berge* case (R. 89–90):

> Section 114 (b) (4) will be much simpler in administration under the commissioner's interpretation. Tax officials will look first to the taxpayer's 1934 return. If this reports items of gross income from a mining property they need look no further to ascertain the method of computing depletion allowance for such property in future years; if it does not, then they must find the "first return in respect of" such property in some later year. * * *

In view of the contrast in the practical operation of the two alternatives we can perceive no justification for doubting the validity of the applicable Treasury regulation.

CONCLUSION

The decision below follows the plain meaning of the words of Section 114 (b) (4). In re-

[7] Petitioner's suggestion (Br. 14) that taxpayers would refer to the return in which the election was made, thus guiding the Commissioner, obviously does not meet the administrative difficulty discussed above. Neither would it avail the Commissioner anything in the years after 1934 to check the return for the previous year.

fusing to extend the special privilege created by the section to the petitioner, which failed to bring itself within the words of the statute, the court gave proper effect to an explicit Treasury regulation admittedly applicable to the case. The conclusion reached was fair and administratively sound. Therefore, the decision should be affirmed.

Respectfully submitted.

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NOVEMBER 1942.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent

provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each. (For percentage depletion allowable under this subsection, see section 114 (b), (3), and (4).)

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * * *

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(4) *Percentage depletion for coal and metal mines and sulphur.*—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion)

from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 23 (m)-1. *Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.*—Section 23 (m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under these provisions of the Act the owner of an interest in mineral deposits,

mineral properties, or timber, whether freehold or leasehold, is allowed annual depletion and depreciation deductions which, in the aggregate, will return to him the cost or other basis of such property as provided in section 113, plus, in either case, subsequent allowable capital additions (see articles 23 (m)–15 and 23 (m)–16) with the following exceptions and qualifications:

* * * * *

(2) In the case of coal mines, metal mines, and sulphur mines or deposits the aggregate annual allowable deductions may never be as great as the cost or other basis, if an election of the percentage depletion method is made in his first return under Title I of the Act; and

* * * * *

When used in these articles (23 (m)–1 to 23 (m)–28) covering depletion and depreciation—

* * * * *

(g) "Gross income from the property" as used in section 114 (b) (3) and (4) and articles 23 (m)–1 to 23 (m)–28, inclusive, means the amount for which the taxpayer sells (a) the crude mineral product of the property or (b) the product derived therefrom, not to exceed in the case of (a) the representative market or field price (as of the date of sale) of crude mineral product of like kind and grade before transportation from the immediate vicinity of the mine or well, or in the case of (b) the representative market or field price (as of the date of sale) of a product of the kind and grade from which the product sold was derived, before the application of any processes (to which the crude mineral product

may have been subjected after emerging from the mine or well) with the exception of those listed below, and before transportation from the place where the last of the processes listed below was applied. If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes minus the costs (including transportation costs) of the processes not listed below. The processes excepted are as follows:

(1) In the case of coal—cleaning, breaking, sizing, and loading at the mine for shipment;

(2) In the case of sulphur—pumping to vats, cooling, breaking, and loading at the mine for shipment;

(3) In the case of iron ore and ores which are customarily sold in the form of the crude mineral product—sorting or concentrating to bring to shipping grade, and loading at the mine for shipment; and

(4) In the case of lead, zinc, copper, gold, or silver ores and ores which are not customarily sold in the form of the crude mineral product—crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other) than crushing and concentrating (by gravity or flotation).

In all cases there shall be excluded in determining the "gross income from the property" an amount equal to any rents or royalties which were paid or incurred by the

taxpayer in respect of the property and are not otherwise excluded from the "gross income from the property." If royalties in the form of bonus payments or advanced royalties (see article 23 (m)–10) have been paid in respect of the property in the taxable year or in prior years, the amount excluded from "gross income from the property" for the taxable year on account of such payments shall be an amount equal to that part of such payments which is allocable to the products sold during the taxable year.

(h) "Net income of the taxpayer (computed without allowance for depletion) from the property," as used in section 114 (b) (2), (3), and (4) and articles 23 (m)–1 to 23 (m)–28, inclusive, means the "gross income from the property" as defined in paragraph (g) less the allowable deductions attributable to the mineral property upon which the depletion is claimed and the allowable deductions attributable to the processes listed in paragraph (g) insofar as they relate to the product of such property, including overhead and operating expenses, development costs properly charged to expense, depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. Deductions not directly attributable to particular properties or processes shall be fairly allocated. To illustrate: In cases where the taxpayer engages in activities in addition to mineral extraction and to the processes listed in paragraph (g), deductions for depreciation, taxes, general expenses, and overhead, which cannot be directly attributed to any specific activity, shall be fairly apportioned between (1) the mineral extraction and the processes listed in paragraph (g) and (2) the additional

activities, taking into account the ratio which the operating expenses directly attributable to the mineral extraction and the processes listed in paragraph (g) bear to the operating expenses directly attributable to the additional activities. If more than one mineral property is involved, the deductions apportioned to the mineral extraction and the processes listed in paragraph (g) shall, in turn, be fairly apportioned to the several properties, taking into account their relative production.

* * * * *

ART. 23 (m)–5. *Computation of depletion based on a percentage of income in the case of coal mines, metal mines, and sulphur mines or deposits.*—Under section 114 (b) (4) a taxpayer may deduct for depletion an amount equal to 5 per cent of the gross income from the property during the taxable year in the case of coal mines, an amount equal to 15 per cent of the gross income from the property during the taxable year in the case of metal mines, and an amount equal to 23 per cent of the gross income from the property during the taxable year in the case of sulphur mines or deposits, but such deduction shall not in any case exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. (For definitions of "gross income from the property" and "net income of the taxpayer (computed without allowance for depletion) from the property," see article 23 (m)–1 (g) and (h).)

In his first return made under Title I of the Act (for a taxable year beginning after December 31, 1933) the taxpayer must state as to each property with respect to which

the taxpayer has any item of income or deduction whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to percentage depletion. An election once exercised under section 114 (b) (4) and this article cannot thereafter be changed by the taxpayer, and the depletion allowance in respect of each such property will for all succeeding taxable years be computed in accordance with the election so made. If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion. The method, determined under section 114 (b) (4) and this article, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

* * * * *

ART. 114–1. *Basis for allowance of depreciation and depletion.*—The basis upon which exhaustion, wear and tear, obsolescence, and depletion will be allowed in respect of any property is the same as is provided in section 113 (a), adjusted as provided in section 113 (b), for the purpose of determining the gain from the sale or other disposition of such property, except as pro-

vided in article 23 (m)–3, relating to depletion based on discovery value, in article 23 (m)–4, relating to percentage depletion in the case of oil and gas wells, and in article 23 (m)–5, relating to percentage depletion in the case of coal mines, metal mines, and sulphur mines or deposits.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 94.

MOLDER LOAD COALITION MINES COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 94.

MOTHER LODE COALITION MINES COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Now comes petitioner in the above case and prays that the Court grant a rehearing in the action heretofore taken in limiting its writ of certiorari, and upon reconsideration issue a writ of certiorari to the court below without limitation as to scope.

On June 8, 1942, the Court granted a writ of certiorari to the court below. The grant, however, was limited to "the first question stated in the Government's Memorandum", and in addition, the case was placed on the Summary Docket. We urge that the Court, for the reasons stated below, reconsider its action in thus limiting the grant of the writ. We do not, however, request that the Court remove the case from the Summary Docket, for we believe that even if the writ be

granted without limitation, the cause can be presented to the Court within the time allowed for presentation of cases on that Docket.

The action of the Court follows the suggestion in the Government's Memorandum that the writ be limited. In its Memorandum (p. 2) the Government stated that there were two "Questions Presented" and referred (in error[1]) to two different subsections of Section 114(b) of the Revenue Act of 1934. Actually, the case involves only a construction of Section 114(b)(4). Petitioner is not claiming alternative deductions under two separate sections of the tax statute, which would require construction of the two separate paragraphs in the light of the present facts. Only one question is presented. The issue is accurately stated in the Petition for Certiorari (p. 2) and in the opinion below, in which the Court states (R. 85):

> "The question presented is whether the petitioner is entitled under section 114(b)(4) of the Revenue Act of 1934, 48 Stat. 710, to take a deduction in its 1935 return for percentage depletion upon its copper mining property."

The effect of the limitation suggested by the Government and adopted by the Court is to deprive petitioner of one legal argument in support of its claim for deduction under Section 114(b)(4) of the 1934 Revenue Act. The facts are extremely simple and uncontradicted, and the same simple statement of them (requiring but two

[1] The Memorandum of the Government declares that Question No. 1 involves the Revenue Act of 1934, Section 114(b)(4), and that Question No. 2 involves Section 114(b)(2). The fact is that Section 114(b)(2), relating to Discovery Depletion, is not involved here in any way. The only question in this case is the construction of Section 114(b)(4). This misstatement by the Government may have caused the Court to misapprehend the question before it.

pages in the Government's Memorandum) serves to support both legal arguments.

In view of this, it is difficult to accept the Government's statement (Mem., p. 6) that there is "no necessary connection" between the two questions which it conceives to be involved—the two arguments which petitioner wishes to make in support of its construction of Section 114(b)(4). Both "questions" are simply arguments in support of petitioner's claimed deduction. Both involve construction of the same subsection of the same revenue act. Both are presented upon the same brief and uncontroverted set of facts.

CONCLUSION

We submit, therefore, that we should not be foreclosed from both arguments in support of our interpretation of Section 114(b)(4) particularly in view of the fact that both arguments can be fully presented within the time which the Court has allotted to the oral presentation of the case.

Respectfully submitted,

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I, Paul E. Shorb, Attorney for Petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

PAUL E. SHORB.

June, 1942.

SUPREME COURT OF THE UNITED STATES.

No. 94.—October Term, 1942.

Mother Lode Coalition Mines Company, Petitioner,
vs.
Guy T. Helvering, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 7, 1942.]

Mr. Justice Murphy delivered the opinion o the Court.

The ultimate question presented by this case is whether petitioner is entitled to a deduction in its 1935 income tax return for percentage depletion under § 114(b)(4) of the Revenue Act of 1934, 48 Stat. 680, which allowed the deduction from gross income in the case of mines, etc., of specified percentages of gross income, but not to exceed 50% of the net income computed without regard to depletion allowance, and required that:

"A taxpayer making his *first return under this title in respect of a property* shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, . . ."[1]

The pivotal question is whether petitioner's income tax return for 1934 or for 1935 was the first return in respect of its mining property within the meaning of § 114(b)(4). During the tax year 1934 petitioner's copper mine was closed. In its 1934 income tax return petitioner reported gross income from the sale of ore mined the previous year, but the deductions, most of which were attributed to "Shutdown Expense", were such that there was no net income. Petitioner claimed no depletion allowance in that return—depletion allowances prior to 1933 had exhausted petitioner's cost basis—and made no statement with regard to percentage depletion. In 1935 petitioner derived a net profit from

[1] Emphasis added.

the operation of its mine and claimed a deduction for percentage depletion, stating that it had elected percentage depletion for the future in its 1933 return, filed under § 114(b)(4) of the Revenue Act of 1932, 47 Stat. 169. The Commissioner disallowed the percentage depletion deduction for 1935, ruling that under § 114(b)(4) of the 1934 Act petitioner's 1934 return was its first return in respect of its mining property and that its failure to make an affirmative election in that return constituted an election to compute depletion thereafter without reference to percentage depletion. Accordingly, the Commissioner made a deficiency determination which the Board of Tax Appeals sustained. The court below affirmed. 125 F. 2d 657. We granted certiorari because of an asserted conflict with the decision in *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. 2d 436.[2]

Section 114(b)(4) required petitioner to elect in its "first return under this title [income tax] in respect of a property" whether its depletion allowance was to be computed with or without regard to percentage depletion, and the method thus chosen became binding for the subsequent taxable years. Petitioner's 1934 return falls within the exact statutory definition of "first return". It was the first return filed under the 1934 Act, and it was "in respect of" the mining property since it listed items of gross income and deductions arising out of that property. Petitioner's failure there to state its election foreclosed any subsequent claim to percentage depletion. This has been the administrative interpretation. Article 23(m)-5 of Regulations 86.[3] We think this regulation is binding because not only is it practically compelled by the words of § 114(b)(4), but also it is a reasonable interpretation, which, as will be shortly pointed out, is fair and workable in its operation.

Petitioner asserts that this interpretation fails to give effect to the meaning of § 114(b)(4) as a whole, and contends that

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[2] In granting the writ we excluded argument on the point, decided adversely to petitioner below, that its election to take percentage depletion in its 1933 return under the Revenue Act of 1932 made unnecessary a new election under the Revenue Act of 1934.

[3] This Article provides in part as follows: "In his first return made under Title I of the Act (for a taxable year beginning after December 31, 1933) the taxpayer must state as to each property with respect to which the taxpayer has any item of income or deduction whether he elects to have the depletion allowance for each such property for the taxable year computed with or without reference to percentage depletion. . . . If the taxpayer fails to make such statement in the return in which the election should be so indicated, the depletion allowance for the year for which an election must be first exercised and for all succeeding taxable years will be computed without reference to percentage depletion."

when such effect is given, "first return" must mean the first return in which a depletion allowance could be claimed. The argument for this result runs as follows: Section 114(b)(4) requires the taxpayer to state in its first return whether it elects to have "the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion" and then provides that "the depletion allowance in respect of such property for such year shall be computed according to the election thus made"; therefore, the "first return" must be one in which petitioner could elect to have the "depletion allowance . . . for the taxable year" computed with or without reference to percentage depletion; and, in its 1934 return petitioner could not so elect because a percentage depletion allowance is limited in any case to 50% of net income and it had no net income.

The fallacy of this argument is apparent, and the fault lies in the final step. The statute provides for the election of a method of computation for the present and the future; it does not, contrary to petitioner's assertions, make the necessity for election depend upon whether an allowance actually results from the method of computation chosen. Petitioner could have elected in 1934 to have the depletion allowance for 1934 "computed with or without regard to percentage depletion", and the computation could then have been made according to the method chosen. It so happened that petitioner was not entitled to any allowance in 1934; its depletable cost had been exhausted, and computation on the percentage basis would have resulted in nothing. So the choice had no significance for that year, *but*, that could be ascertained only after the computation was made. The idea that it would be absurd to compel an election until a deduction actually resulted, see *Pittston-Duryea Coal Co.* v. *Commissioner*, 117 F. 2d 436, 438, is best answered by the fact that the statute gave taxpayers an opportunity to elect a depletion program for the present and future years; nothing in it indicates that Congress was concerned with whether a depletion allowance actually resulted in each year from the program selected.

Petitioner's contentions really resolve into the proposition that "first return" means "first return made by a taxpayer having net income derived from a property". But the statute does not speak of first return showing net income and there is nothing to indicate that such was Congress' intention.[4] Furthermore, as the court below pointed out, 125 F. 2d 657 at p. 659, if petitioner had

a basis for cost depletion in 1934 it would have been put to an election in that year even though it had no net income because cost depletion allowance is in no manner dependent upon the existence of net income. The fact that petitioner's depletable cost was exhausted is no reason for expanding the statutory definition. Section 114(b)(4) is a liberal offer limited to those who meet the exact statutory terms. *Riley Co.* v. *Commissioner*, 311 U. S. 55.

Strong practical considerations also support the Commissioner's construction of the statute and warrant rejection of petitioner's "first return with net income" theory. All taxpayers are put on an equal basis if they must elect their depletion program in the first return filed "in respect of a property"; a taxpayer, situated as petitioner, is not then free to defer election until it has net income at some future date when conditions may be such that its election can be made more advisedly than that of its competitors. Secondly, administrative simplicity and certainty are best achieved by the Commissioner's interpretation. If by "first return made by a taxpayer having net income derived from a property", petitioner means first return for a year in which there actually was net income, cf. *Kehoe-Berge Mining Co.* v. *Commissioner*, 117 F. 2d 439, it could not be known in some cases whether a taxpayer was put to its election in 1934 or a later year until after finally determining, perhaps after protracted litigation, whether or not the taxpayer had actual net income in 1934. The uncertainty and confusion thereby created would be most undesirable; a taxpayer could not intelligently plan its operations, and the Bureau of Internal Revenue would be compelled to keep open all the returns for subsequent years in order to check the later depletion deductions. If it is petitioner's contention that the critical fact of net income is disclosed by the face of the return, the obligation to state an election would depend to some extent upon the errors of the taxpayer, a consequence which it is not to be presumed that Congress intended.

The judgment below is *Affirmed.*

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[4] Petitioner relies upon the remarks of Representative Disney who offered an amendment to § 114(b)(4) of the Internal Revenue Code, as part of the Revenue Act of 1942, which would have written the petitioner's interpretation into the statute with the explanation that the amendment clarified the original Congressional intent. Hearings Before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess., p. 3489. However, this amendment was rejected in Committee. Section 145(a) of the Revenue Act of 1942, approved October 21, 1942, eliminates the necessity of election, but nothing in its legislative history casts any light upon our problem.